CIVIL JUSTICE COMMITTEE

1924-25

REPORT

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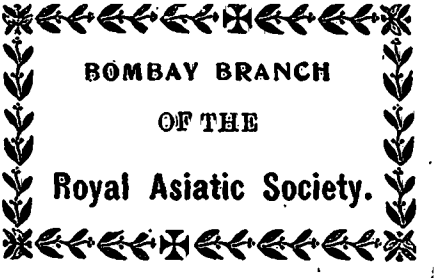

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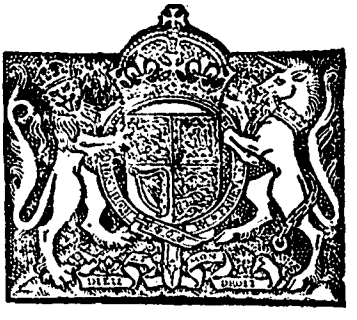

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NOTE.

The cost of this Committee, excluding the cost of printing the report and the appendices, is estimated to have been Rs. 2,82,867.

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INTRODUCTORY.

Government of India's circular letter.

On the 25th June 1923 the officiating Joint Secretary to the Government of India, Home Department, addressed the following letter, No. F.-159-1922-Judl., dated Simla, the 25th-28th June 1923, to all Local Governments.

Subject.—Delay in the disposal of suits and appeals.

" I am directed to address you in regard to certain aspects of the administration of civil justice which have lately engaged the renewed attention of the Government of India, namely the delay in the disposal of suits and appeals and the unsatisfactory results obtained in the process of the execution of decrees. The representations which the Government of India have received on this subject do not suggest that efforts have been lacking to expedite the course of civil justice, nor that, if a comparison were made with the figures of the duration of suits in previous periods, it would necessarily indicate a deterioration of the position. They nevertheless suggest that the course of litigation is still, in spite of all efforts made to expedite it, subject to such delays as tend to cause some lack of confidence in our administration of justice, and must inevitably create an obstacle to the commercial and industrial development of India. This latter consideration indeed is one which adds great importance to the matter.

(2) The main figures regarding the duration both of regular suits and appeals in the High Courts and subordinate courts throughout India are given in the attached statement. They are not in all cases complete and do not offer an accurate basis of comparison between the courts of different provinces. Nor indeed has the statement been compiled with the object of instituting any such comparison for it need hardly be said that the circumstances of provinces differ so widely both as regards the strength of their judicial establishments, the nature of the litigation, and the character of the legal practitioners on whose capacity the despatch of civil litigation must largely depend, that any attempt to institute comparisons would be as infructuous as it is undesirable. But it is not open to question that the figures demonstrate that in many cases there is very serious delay in the disposal of suits, nor can it be said that such delay is confined to the operation of the courts in their appellate jurisdiction. As regards the execution of decrees, it has been found impossible to prepare any statement in a compendious form which will show the results obtained. It is clear, however, that there are substantial facts to support the common criticism that litigants are unable to gain adequate satisfaction for the decrees passed in their favour. Thus taking the figures reported by provinces in 1921 (and these again are selected purely or purpose of illustration and not for comparison) it will be

found that the Bengal mofussil courts returned execution proceedings as infructuous in no less than 245,344 cases, the percentages of totally infructuous cases in some districts being as high as 71 and 63 per cent. In the same year the mofussil courts of Madras (except village courts) obtained satisfaction in full in only 16·56 per cent. of the applications for execution, and satisfaction in part in 7·19 per cent. while the number of wholly infructuous applications was 239,421. The courts subordinate to the Allahabad High Court dealt with 141,639 applications for execution of decrees, and of these 57,711 were totally infructuous; those subordinate to the Lahore High Court dealt with 174,566 applications of which 83,902 were returned as totally infructuous; out of 139,742 applications before the courts in the districts of Central Provinces and Berar 66,286 were returned as infructuous.

(3) It will of course be understood that while referring to representations made on this subject, and in detailing figures which would seem to go far to justify them, the Government of India do not intend thereby to cast any slur, or even suggest any criticism on the judicial officers engaged in the administration of civil justice or on the High Courts under whose control they discharge their duties. Indeed, such provisional conclusions as the Government of India have been able to form on the subject, seem to point to the fact that if the present state of administration, both in regard to the disposal of suits and the execution of decrees, offers field for criticism, the reason is to be found in the factors of general application which for the most part are beyond the control of the civil judiciary. It would perhaps serve little purpose to refer in detail here to previous correspondence (which dates from as far back as 1873) between the Government of India and the Local Governments on the various aspects of this question. In the course of this correspondence, attention has at different times been directed to general or particular modifications in the Civil Law or the procedure of the courts calculated to expedite the course of litigation whether in the Indian courts themselves or in the course of appeals to the Privy Council. Substantial improvements have from time to time been effected in both respects, and at the same time Local Governments themselves have faced the necessity for making considerable increases in their judicial establishment both in the High and subordinate courts. The Government of India feel therefore that if any improvement is to be now effected, it can only be as the result of a review of the whole question in its widest aspects. They are aware that the peculiar circumstances of India make it exceptionally difficult to secure expedition in many types of civil litigation. In some provinces the disposal of suits relating to land involve a lengthy consideration of the bearing of customary laws which have not up to the present been codified, or even crystalised in a definite or unified form. In other provinces the state of the local law, as for instance that relating to impartible estates, is itself responsible for the great delay which characterises this class of cases. Throughout India the fact that the courts have to depend on the services of an inferior and sometimes unreliable ministerial

agency leads to great delays in the service of notice and the execution of decrees. A social system which involves in some cases the necessity of considering the claims of members of joint families and in others those of numerous collaterals and reversioners tends in itself to complicate litigation by introducing as parties to suits a far larger number of litigants than would be usual in other countries. In many of the mofussil courts the capacity and experience of practitioners is not such as to ensure either that precision in the drawing of pleadings or economy in the examination of parties and witnesses which is essential to the despatch of business. While, however, these factors must inevitably present obstacles to the expedition of civil litigation in India, the Government of India believe that a thorough investigation of other factors arising primarily in the procedure dictated by the law or followed by the courts, would yield important results. It has been for instance suggested that the law of Limitation is susceptible of further improvement particularly in respect of the opportunities which it furnishes for prolonging execution proceedings, that the allowing of appeals and revisional applications against interlocutory orders is generally productive only of loss of time, that a definite enactment is required against champerty, that rules are required for the registration of addresses in order to avoid delay in the serving of notices, that the procedure for substitution of heirs of deceased parties requires reconsideration, and that the practice in regard to the issue of orders staying execution, of allowing applications for transfer and of making and subsequently setting aside *ex parte* orders and decrees should be modified with a view to curtailing the facilities available for deliberately delaying the course of justice. Among minor matters again it is suggested that much delay could be avoided by a careful revision of the system of translating and printing the records in appeal cases. At present much unnecessary work is done under both heads.

(4) The Government of India recognise that the administration of civil justice is now a Provincial subject; but the question under reference is one of wide and general importance on which uniform action is desirable. The immediate proposal which they have in view is the appointment of a committee to consider the whole question; and they would desire if possible to associate with this enquiry a judge from England having experience of the steps taken in England in recent years to expedite the course of civil litigation. It is in regard to the advisability of appointing such a committee, and the scope of its enquiry if appointed that I am directed to request an expression of opinion of the Madras, etc., Government. The Government of India wish to make it clear that this enquiry would not deal with considerations connected with the strength of the judicial establishment, for they have no desire that measures should be suggested which would involve an increase of expenditure on Local Governments. They look primarily to such modifications of the law and procedure as would in themselves lessen the burden now placed on that establishment, while allowing of the greater expedition of civil litigation; and would, without placing fresh

charges on the Local Governments, afford some remedy for a state of affairs which seems to appear to call for remedy at the hands of Government."

Constitution of the Committee.

Government of India's resolution.

2. After receipt of the replies from the various Local Governments, in some of which the opinions of the judges and other officers consulted by them were enclosed, the Government of India by its resolution No. F.-159-22-Judl., dated the 24th January 1924 constituted this Committee. The resolution runs thus:—

"In the letter of the 25th June 1923 which is annexed to this Resolution, the Government of India consulted Local Governments and High Courts upon certain aspects of the administration of civil justice in India and the steps which should be taken to remedy them. The Government of India suggested that a Committee should be appointed to consider the whole question, and the replies received, which are also annexed to this Resolution, indicate a general consensus of opinion in favour of this suggestion.

(2) The aspects in question are the delays in the disposal of civil suits, appeals and execution proceedings, and the difficulties experienced by litigants in obtaining adequate satisfaction for the decrees awarded by the courts in their favour. The Government of India suggested that the course of litigation was still subject to such delays as tend to cause some lack of confidence in the administration of justice in India, and must inevitably create an obstacle to the commercial and industrial development of India. They consider that this provisional opinion is fully endorsed in the correspondence now published. Certain provisions of the substantive and adjective law of the land which contribute to the existing unsatisfactory position are discussed by the authorities who have given their opinions in the annexed correspondence. The Government of India recognise that the position may be due in part to circumstances prevailing in India which cannot be wholly remedied by modifications of the law. They believe, however, that there can be no doubt of the serious nature of the problem, and that it is incumbent on the executive Government to endeavour to find a remedy for the existing state of affairs.

(3) The Governor General in Council has accordingly decided to appoint a committee:—

To enquire into the operation and effects of the substantive and adjective law, whether enacted or otherwise, followed by the courts in India in the disposal of civil suits, appeals, applications for revision and other civil litigation (including the execution of decrees and orders), with a view to ascertaining and reporting whether any and what changes and improvements should be made so as to provide for the more speedy, economical and satisfactory despatch of the business transacted in the courts and for the more speedy, economical and satisfactory execution of the processes issued by the courts.

Constitution of the Committee.

The Committee will not enquire into the strength of the judicial establishments maintained in each province.

(4) The Hon'ble Mr. Justice George Claus Rankin, Barrister-at-Law, Puisne Judge of the High Court of Judicature at Fort William in Bengal, has consented to serve as Chairman of the Committee.

The following have agreed to serve as Members:—

The Hon'ble Mr. Justice Louis Stuart, C.I.E., I.C.S., Puisne Judge of the High Court of Judicature at Allahabad.

Dr. Francis Xavier DeSouza, I.C.S., Barrister-at-Law, District and Sessions Judge in the Bombay Presidency.

Dewan Bahadur Sir Tirumalai Desika Achariyar Avargal, Kt., Vakil, Trichinopoly.

Mr. C. V. Krishnaswami Ayyar, Subordinate Judge in the Madras Presidency will be the Secretary of the Committee.

(5) The Committee will assemble at Calcutta on the 4th February 1924, and will visit such other places in India as may be arranged by the Chairman. In each province visited the Chairman will have power to co-opt as members of the Committee such practising lawyers as may be prepared to serve on the Committee whilst it is conducting its enquiries in that province, and such other officers as the Local Government may depute for the purpose. The Chairman will also have power to co-opt as members of the Committee such practising lawyers or officers, as he may consider desirable, when the Committee is considering its report.

(6) The Committee will conduct its enquiries in public but any part of its proceedings may be conducted *in camera* if the Chairman considers such a course desirable in the public interest. Persons who desire to be called as witnesses should apply in writing to the Secretary to the Civil Justice Committee, Camp, giving their full names and addresses together with a brief memorandum of the points in regard to which they desire to give evidence."

Co-opted members.

3. In order that the Committee might have the benefit of local knowledge and experience, the gentlemen whose names are hereunder given were co-opted and acted as our colleagues for the purposes of our enquiry in their respective provinces. Many of them wrote special memoranda for our guidance and to all of them we are indebted for invaluable assistance.

Bengal.

1. Mr. H. C. Liddell, I.C.S., District Judge, Hoogly.

2. Babu Durga Prasad Ghose, Sub-Judge and Assistant Sessions Judge, Alipore.

3. Rai Bahadur, K. C. Bose, Senior Government Pleader, Alipore.

4. Babu Narendra Kumar Basu, Vakil, High Court, Calcutta.

Assam.

1. Mr. R. E. Jack, I.C.S., District and Sessions Judge, Assam Valley Districts, Gauhati.

2. Rai Bahadur, Kalicharan Sen, B.L., Government Pleader, Gauhati.

United Provinces.

1. Mr. L. S. White, I.C.S., Additional District and Sessions Judge, Lucknow.

2. Dr. Sir Tej Bahadur Sapru, K.C.S.I., Advocate, Allahabad.

3. Syed Nabi Ulla Khan, Barrister-at-Law, Lucknow.

Punjab and Delhi.

1. Colonel, B. O. Roe, District and Sessions Judge, Jullundur.

2. Mr. J. Coldstream, I.C.S., formerly District Judge, Delhi.

3. Bakshi Tek Chand, M.A., LL.B., Advocate, High Court, Lahore.

Burma.

1. Mr. H. F. Dunkley, I.C.S., Barrister-at-Law, District and Sessions Judge, Bassein.

2. Mr. P. N. Chari, Pleader, High Court, Rangoon (now Judge, Rangoon High Court).

Bihar and Orissa.

1. Mr. J. F. W. James, I.C.S., District and Sessions Judge, now employed as Registrar, High Court of Judicature at Patna.

2. Syed Mohammad Hussain, M.L.C., Vakil, Bankipore.

Central Provinces.

1. Mr. D. G. Mitchell, C.I.E., I.C.S., Legal Remembrancer, Central Provinces.

2. Dr. (now Sir) H. S. Gour, D.C.L., LL.D., M.L.A.

Madras.

1. Diwan Bahadur, C. V. Viswanatha Sastri, District Judge, South Arcot District.

2. Mr. V. Radhakrishnaiya, High Court Vakil, Madras.

3. Dewan Bahadur, C. Krishnaswami Rao, Retired District Judge, Madras.

Bombay.

1. Mr. G. M. Gupte, Advocate, High Court, Bombay.

Karachi.

1. Mr. T. G. Elphinstone, Barrister-at-Law, Government Pleader, and Public Prosecutor for Sind.

4. For the purpose of considering our report Sir Tej Bahadur Sapru, K.C.S.I., and Mr. H. P. Duval, C.I.E., I.C.S., were co-opted as members. Mr. Duval's colleagues desire to express their thanks to the Government of Bengal for permission to co-opt him as a member.

5. By permission of the Government of India we print as an appendix to this Introduction certain observations recorded by Sir Tej Bahadur Sapru, at a time when the desirability of appointing a committee to enquire into certain aspects of civil justice was under consideration by the Government of which he was a member.

Tour and enquiry by the Committee.

6. The office of the Committee assembled at Calcutta a few days before the 27th January 1924 from which date the Chairman was placed on special duty in connection with the Committee. The first meeting of the Committee, as originally constituted, took place on the 4th of February 1924 and the next few days were spent in drawing up the Questionnaire which is printed in the first volume of the evidence. The examination of the Calcutta witnesses began on the 6th of February. The sittings of the Committee at the different places visited are shown below:—

Sittings of the Committee held for the oral examination of witnesses.

Place.	Sittings opened on	Sittings closed on	Remarks.
Calcutta .	4th February 1924	7th March 1924 .	Assam witnesses also examined at Calcutta.
Allahabad .	10th March 1924 .	3rd April 1924 .	Oudh witnesses also examined at Allahabad.
Lahore . .	7th April 1924 .	23rd April 1924 .	Delhi witnesses also examined at Lahore.
Rangoon .	30th April 1924 .	19th May 1924 .	On 7th and 8th May 1924 Mr. Justice Stuart sat at Mandalay to hear witnesses.
Patna . .	25th June 1924 .	9th July 1924 .	
Nagpur . .	14th July 1924 .	24th July 1924 .	
Madras . .	29th July 1924 .	15th August 1924	
Bombay . .	20th August 1924	3rd September 1924	
Karachi . .	8th September 1924	12th September 1924	

7. The Committee has been engaged in writing its report from the middle of September last, partly at Simla and partly in Calcutta. Much assistance was derived from materials placed at

the disposal of the Chairman by the Home Department of the Government of India, both during the interval between our visit to Rangoon and to Patna, and after the Committee's tour had been concluded. The Committee has in all examined 373 witnesses. Besides these many public bodies and others submitted memoranda of their views.

Acknowledgment of assistance of Local Governments, High Courts and the Bar.

8. During our tour we received the most cordial co-operation from the Local Governments, from the High Courts and from the judicial officers of all grades. We wish to record our special indebtedness in all provinces to the legal profession and to the several Bar associations and other bodies who at the expense of much time and labour furnished us with memoranda and oral evidence.

Acknowledgment of the secretary's services.

9. To Mr. C. V. Krishnaswami Ayyar, the secretary of the Committee, we have been indebted at every stage of our enquiry and of our report. We desire to express our thanks to him for labours which have been heavy and many-sided and to record our high appreciation of the learning and ability with which he has assisted us throughout.

Record of evidence.

10. To print *in extenso* all the memoranda with which we were favoured and the shorthand notes of all the evidence would involve expenditure more heavy than is reasonably required. A selection has been approved by the Chairman and it is hoped that it will be found to be both adequate and representative in the case of each Province. The memoranda written by co-opted members were of great assistance to us and will also be printed. Attention is drawn to the fact that the notes of evidence have not been corrected by the witnesses and are to be regarded merely as notes made by the shorthand-writers of the Committee for the purposes of the Committee. We have found them amply sufficient for our purposes.

11. At Allahabad and later in Calcutta Sir Tej Bahadur Sapru discussed all the more important matters dealt with in the report, and his colleagues have much satisfaction in knowing that, having read the report in draft, he is prepared to sign as being in general agreement therewith.

G. C. RANKIN.
L. STUART.
F. X. DESOUZA.
T. DESIKACHARI.
TEJ BAHADUR SAPRU.
H. P. DUVAL.

C. V. KRISHNASWAMI,
Secretary.

2nd January 1925.

Note on the Causes of Delay in Civil Courts.

By Sir Tej Bahadur Sapru, K.C.S.I.

Dated, 20th August 1922.

In dealing with the question of delay in civil litigation in India, it is impossible to refer to any one cause as either the sole or the main cause for the protraction of litigation. I think it will be more convenient to deal with the subject first with respect to conditions prevailing in subordinate courts and then with respect to High Courts.

I.—Subordinate Courts.

(1) Almost everywhere the complaint is that the judiciary is under-staffed or under-manned. Speaking from my knowledge of United Provinces I can say that the number of cases which an ordinary munsif—the lowest grade of civil judge or a subordinate judge—disposes of in the course of a year, is very much larger than he can reasonably be expected to do. I believe the complaint is universal in India.

(2) There is undoubtedly a tendency on the part of legal practitioners to multiply the number of witnesses examined in cases and not infrequently to cross-examine them at inordinate length. I believe the inability of courts to check those inordinately-lengthy cross-examinations arises from several causes.

(3) Very frequently I have found that at the start of a case, the subordinate judge is supremely ignorant of facts and pleadings in the case and the real issues arising in it. This is mainly due to the fact that though the law requires that the case should be opened, it is in actual practice very seldom opened. In the Province of Agra the pleaders are not accustomed to it, and I have found many of them holding the view that it is extremely dangerous to lay your cards on the table at the start of the case. I have also found subordinate judges also holding the view that it is waste of time to open the case. The result is that if a point arises during the trial as to the relevancy or admissibility of any evidence, the subordinate judge is either unable to come to a decision then and there, or does not want to take the risk until he has mastered the whole case which he usually does when the case comes to be argued on both sides and sometimes even later. It is by no means infrequent to come across the remark by the judge that evidence which is objected to by one party is admitted " subject to decision at the time of argument." I very well remember Sir John Stanley and Sir Henry Richards in civil cases commenting very severely upon practice of this sort, but their strictures had little effect. I think the position in Oudh in this respect is better, as my experience there has been that subordinate judges usually comply with the requirements of law so far as the opening of a case is concerned. I have not much experience of other parts of India, but I have heard

that excepting when the counsel from High Courts appear in subordinate courts, it is very seldom that there is an opening of the case.

(4) I may add that documents which are produced as evidence in the case are very frequently marked as " Exhibits " in the case *after* the judgment is written, and sometimes even later, and not at the time when they are proved. This, too, is a practice which, to my knowledge, has been condemned by several judges of the Allahabad High Court.

(5) In important cases before subordinate judges involving large pecuniary interest or intricate questions of law and fact, senior counsel from High Courts are sometimes engaged, and I have found very few subordinate judges being able to exercise necessary control over the conduct of such cases by senior counsel.

(6) An extraordinary amount of time is wasted over the service of processes. Much of it is no doubt excusable inasmuch as the distances at which parties or witnesses live are great, and there are serious transport difficulties in the interior. At the same time it must be borne in mind that if a party desires to prolong litigation —and not unoften the tactics of delay are adopted with a view to tire the patience of the other party or to put him to loss of money— he can do so easily by getting at the process-servers who are an extremely ill-paid staff. Anyone who has practised in subordinate courts knows that it is a matter of common notoriety that you cannot get a process served without paying something to the process-server. Corruption among them is, to my mind, beyond all doubt, while the supervision is not as strict as it might well be.

(7) The habit of seeking adjournments on grounds which are not often of a satisfactory character, is very common in the mofussil. Very often it so happens that witnesses are summoned to appear in courts just a few days before the commencement of the actual trial. When they or some of them do not appear in the court on the day of trial, either because they have not actually been served with summonses or because they have been served too late, or because they are colluding with the party who does not want to go on with the case on which it is fixed, an application is made for an adjournment which is very often granted subject to payment of costs for such adjournments. I know strong judges refuse to adjourn cases on such grounds, but the number of such judges is not very large. I think this defect can be remedied if the High Courts frame and enforce rules (which, to my mind, they have power to do) fixing the time-limit within which parties must put in an application for service of summonses.

II.—Causes attributable to our state of law.

There are several legal causes which, to my mind, are as responsible for abnormal delays as either the weakness of the judges or the laxity of the Bar.

(1) Although the present Civil Procedure Code lays considerable stress on precision and exactness in pleadings, and although

the Bar in the mofusil is far more educated and far more competent than it was, say forty years ago, yet Indian courts are much more indulgent than they should be in the matter of pleadings. In the olden days when legal education in India had yet to be developed, the Privy Council laid down in some cases that courts in India should not be very strict in construing pleadings. Although conditions have, to my mind, absolutely changed, yet the courts continue to follow the dicta of the Privy Council in those old cases. Looseness in pleadings, to my mind, is a fruitful source of unconscionable delays in this country.

(2) Our whole system of registration is defective. Even though a registered mortgage deed may recite in so many words the fact that consideration has been paid, yet our system allows the defendant to deny the fact that he has received consideration, and even in ordinary suits this necessarily involves considerable delay. I have given this only as an illustration.

(3) The method of proving private and public documents laid down by the Indian Evidence Act requires, to my mind, careful revision. I have come across cases in which a party producing documents which are obviously perfectly genuine, meets with the greatest difficulty in getting them admitted in evidence because the other party light-heartedly or vexatiously puts the former to proof. In the mofusil nothing is more common than pleaders of one party denying the genuineness of the documents produced by the other party.

(4) The worst delays take place when evidence is recorded on commission or when accounts are referred to a commissioner. I have frequently noticed very serious abuse of the right of cross-examination of witnesses before commissioners, and I have also known of cases which have taken months and months to be heard and disposed of merely because the accounts have been referred to a commissioner, for examination. I can recollect a case in which I myself appeared in its last stages in the High Court which was filed in 1905 and not disposed of until the beginning of this year during my absence from the profession.

(5) It is also a question for consideration whether the provisions of Order 37 of the Code of Civil Procedure, which prescribe summary procedure for cases relating to Negotiable Instruments (more or less in accordance with English practice) should not be extended to subordinate courts. As the law stands at present, it applies only to the High Courts of Calcutta, Madras and Bombay, as also to the Chief Court of Lower Burma and the court of the judicial commissioner of Sind. I think the time has come when it should be extended to important towns in every province. In the United Provinces I would extend it to such important towns as Cawnpore, Aligarh, Agra, Benares, Lucknow, Meerut and Moradabad. These are the districts where generally we have cases relating to negotiable instruments. Indeed I am of opinion that at important commercial centres, we must have commercial judges to dispose of commercial cases. The ordinary procedure prescribed for what are known as " title suits " in India is not, to my mind, suited

for such cases; nor can an ordinary subordinate judge deal with commercial cases as expeditiously and effectively as a specially-trained commercial judge can.

(6) Considerable time is wasted over perfectly idle appeals from interlocutory orders, such as an order granting or refusing to grant an injunction, or appointing or refusing to appoint a receiver; and it sometimes happens that an interlocutory order is invited only with a view to cause delay in the hearing of the case, but I am not prepared at present to make any specific suggestions with regard to the stiffening of our law in this respect though I do feel that this is a matter for careful investigation and enquiry.

III.—Other defects in Legal System.

(1) I shall now deal with certain other features of our legal system which, to my mind, are to a great extent responsible for unnecessary and ruinous litigation involving considerable expenditure of public time.

First of all our whole system of execution of decrees has the inevitable effect of prolonging litigation. Our Law of Limitation relating to decrees provides so many subterfuges and so many excuses for prolonging execution, that it is a surprise to me that decrees are sometimes speedily executed. Ordinarily, a dishonest decree-holder or a dishonest judgment-debtor can, if he so desires, choose his own time when he will execute the decree or allow the decree to be executed.

To illustrate my point with reference to the provisions of the Law of Limitation as applicable to execution cases, the expression " a step in aid of execution " in article 182 is a standing temptation to dishonest attempt both on the part of decree-holders and judgment-debtors.

I strongly feel that the time has come when some drastic steps should be taken to revise our whole system of execution of decrees and to place it on a more satisfactory footing.

(2) Intimately connected with this is the question of the periods of limitation prescribed for suits and applications by the Limitation Act. Old titles are sometimes disturbed merely because our Law of Limitation is so indulgent. One of the commonest class of cases is represented by suits filed by reversioners to set aside alienations made by a Hindu widow without any legal necessity. Now a Hindu widow may survive an alienation made by her for a period of fifty years. The law allows the reversioner twelve years from the death of the widow. Only recently I recollect reading a case in the Privy Council Reports in which an alienation made between 70 and 80 years ago was sought to be set aside. I have appeared in numberless suits of this description in which alienations of 30 to 40 years back were attacked. Those cases lead to any amount of false evidence because the genuine evidence has disappeared and they lead to a congestion of work in our courts, so that honest

suitors are obstructed in getting their cases disposed of as quickly as they might have been but for these stale claims.

(3) I shall now refer to the evils of benami system. The system of benami transactions has been repeatedly recognised by the Privy Council and by the High Courts in India; but every lawyer in India knows that benami purchases are sometimes used as weapons of offence and defence against honest third parties. There is, to my mind, need for the reform of our law in this respect.

(4) In India, speaking generally, there is no law against champerty, and the Privy Council and High Courts have entertained champertous claims. While no doubt some poor and genuine claimants have every reason to be grateful for the present state of law, I have no doubt that the laxity of it has led to great abuses. In important cases relating to big estates there is always a speculator appearing on the scene, and it is a matter of common notoriety that in Oudh the moment a talukdar dies without leaving any lineal male heir, half a dozen speculators appear on the scene to foment litigation, make money out of it, and if in the end the poor and impecunious claimant who has sought their help, succeeds in the case, he gains very little. I believe the time is ripe for legislation in regard to champerty.

(5) I shall now refer to cases relating to talukdari estates in Oudh which are governed by Act I of 1869 passed by the Indian Legislature; and to cases relating to impartible estates. These are the most troublesome cases and take years and years to dispose of. The issues involved are sometimes exceedingly complicated and usually some sort of custom is set up which throws open the floodgates of evidence. The whole law with regard to impartible estates is in such a state of uncertainty and confusion that I think no lawyer can feel sure as to what may happen in a particular case. It was expected that the Privy Council would avail themselves of the opportunity of settling the law in a recent appeal which went up to them from the Allahabad High Court. I know the case very well as I was Counsel for one of the parties when it was before the High Court. I believe the result of the decision of Their Lordships of the Privy Council will be to create still greater uncertainty, and a learned writer in a recent book has very severely criticised this decision. I think it is for the Provincial Governments to make an enquiry into the history and conditions of tenure of these big estates and to legislate for them. My recollection is that many years ago the late Sir Bhashyam Aiyangar, perhaps the foremost lawyer of his day in India, introduced a Bill on the subject in the Madras Council, but I have not been able to discover whether the Bill was passed into law. As regards the Oudh Talukdari Act, I can only say that it has been and is the despair of every lawyer and judge who has had to deal with that Act. I have appeared in a number of talukdari cases, and I feel that no Act of the Indian Legislature has done more to promote litigation than this Act has. In Oudh during the last ten years one Special Judge, Pandit Sitla Prashad Bajpai, has been appointed to dispose of these cases, and he is at

the present moment trying a case in which I was approached by one of the parties so far back as 1918. I believe it was filed in 1919 or 1920, and Mr. Bajpai who met me at Simla only a few weeks ago, told me that for the last one year and nine months or thereabouts he has been recording only the evidence in the case and that it would take him several months before he would be able to deliver his judgment. This is by no means a singular instance. If necessary, I can mention at least a dozen cases off-hand which have taken about a year or more to be disposed of. I once brought the unsatisfactory character of this Act to the notice of Sir James (now Lord) Meston but that was during the war. It is for the United Provinces Government to consult the talukdars and to make up their mind as to what they would like to do with this Act. I for one think that instead of the Act being a blessing to the taluqdars, it is a curse to them, and the only class of people who stand to gain by its continuance on the Statute-book are the members of the legal profession.

IV.—Causes of delay in High Courts.

(1) I will now come to causes of delay in the High Courts. In India, I believe there is scarcely a High Court at the present moment which is not suffering from a very serious congestion of work. My own belief is that, at any rate in some High Courts, the number of judges will have to be increased.

(2) In the High Courts records are translated, and in many cases which are above a certain pecuniary value they are also printed. The translation departments are, I am told, under-staffed. It was certainly the case in Allahabad when I practised there.

(3) Much of the delay in the High Courts is caused by the time taken in getting notices on parties served. Very often it happens that notice after notice is returned unserved because the correct address of the opposite party has not been given. I think much of this evil might be remedied if the High Courts could frame rules for the registration of addresses. I believe the Madras High Court has framed a rule on the subject.

(4) Again, delay is caused by proceedings for the substitution of heirs of deceased parties or for the appointment of guardians or next friends of minors.

(5) The system of translation and printing, too, requires overhauling. It is not necessary that every single document should be translated and printed, and so far as this part of the work is concerned, it is, I am afraid, done more or less perfunctorily. At any rate, this was my experience in Allahabad. The record is overloaded with totally unnecessary documents which are not even referred to by counsel during the argument. The Privy Council have also repeatedly commented upon the future of our records. Sometimes it happens that in order to prove whether a family is joint or divided, or to prove a certain custom recorded in village

papers, a large number of revenue papers are translated and printed. Only a few by way of sample may very well do. I very well remember a case in which I appeared in 1915 or 1916. The value of the suit was only Rs. 12,000, the cost of translation and printing in the High Court came to something like Rs. 8,000 or Rs. 9,000. The only point in the case was as to whether daughters were excluded from inheritance among Jats in the Meerut district. Probably the responsibility for much of this mechanical part of the work could easily be transferred to the shoulders of the parties themselves.

Note on the Desirability of Appointing a Judicature Commission.

By Sir Tej Bahadur Sapru, K.C.S.I.

Dated 6th December 1922.

I shall first deal with the constitution of our courts. At the outset I think it is necessary to point out what exactly a civil court in India means. Briefly put, a civil court may be defined as a court which entertains suits of a civil nature. The Code of Civil Procedure now in force lays down certain rules with regard to the jurisdiction of civil courts. Section 9 of the Code runs as follows:—

> "The court shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.
>
> *Explanation.*—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such a right may depend entirely on the decision of questions as to religious rites or ceremonies."

The cognizance of certain class of suits, though of a civil nature, is expressly or impliedly barred and such suits are not entertainable at all by civil courts. For instance, in certain parts of India suits relating to agricultural rent are not filed in civil courts, other class of suits for which express provision is made in the Rent Act or the Revenue Acts of the Province are also excluded from their jurisdiction. Here, again, it must be pointed out that the Rent Act and the Revenue Act themselves in some provinces provide for certain class of issues being settled by civil courts. To illustrate this, if an application for partition of a zamindari property is made to a Revenue Court in the United Provinces and a question of title is raised, which the Revenue Court considers to raise a difficult question of title and does not feel disposed to try it, it may refer the parties to a civil court. Again, there are special enactments providing for the disposal of special class of cases by certain special officers. For instance, in certain parts of India suits relating to agriculturists are not triable in an ordinary civil court. In Deccan, the 'Deccan Agriculturists' Relief Act provides for special courts for the trial of certain matters affecting agriculturists. In the United Provinces, there is a special Act, called the Bundelkhand Encumbered Estate Act, which provides special machinery for the settlement of claims against agricultural debtors in that part of the province. I believe, similar instances could be quoted from other parts of India. All such suits would be beyond the cognizance of ordinary civil courts. Confining ourselves, therefore, to suits which are not

barred out either by an express enactment or by implication from the jurisdiction of the ordinary civil courts, the variety of suits which go to the ordinary civil courts in this country is bewildering. I shall illustrate this from my own experience of the Province with which I am most familiar. In the United Provinces, a very large number of suits relate to the law of mortgages. Some of them relate to the sale of the property mortgaged; others to foreclosure, and not a few to redemption of mortgages. There is also a very large class of suits relating to pre-emption of zamindari property. Indeed, the law with regard to pre-emption in the United Provinces was, until a few years ago, considered to be in such an uncertain condition that one could cite conflicting decisions upon nearly every single point which arose under the law of pre-emption. The gravity of the situation attracted the notice of the late Chief Justice Sir Henry Richards, who appointed a special Bench consisting of himself and Mr. Justice Tudball to dispose of that class of cases. The two Judges were in agreement with each other in regard to certain principles applicable to that class of cases and for several years together they used to sit together to dispose of hundreds of these pre-emption cases. Both the Judges have now left the Court, but I understand two other Judges who hold more or less similar views now constitute the Bench to dispose of pre-emption cases. Then there is a considerable amount of litigation relating to the law of easements. In addition to this, there are ordinary suits under the Hindu Law raising questions of joint family, partition, father's debts, Stridhan (woman's estate), inheritance, adoption, Specific Relief Act, injunction, etc. Similar questions under the Mahomedan Law relating to divorce, dower, gifts, charitable endowments, very frequently arise in the United Provinces. Commercial litigation, too, is now springing up. With the development of certain industrial centres, one comes across not a few cases relating to partnership, accounts, wagering contracts or time bargains and negotiable instruments. Then there is the special class of cases which is peculiar to the United Provinces, Bihar and Bengal, where there are great rivers. These are called alluvion and diluvion cases. I need not multiply further instances. I believe more or less the same may be predicated of other parts of India. But, there is one statement which I desire to make specially with reference to the Punjab and the United Provinces. In the Punjab particularly there is vast amount of litigation relating to custom. Questions of custom, though not to the same extent, also arise in the United Provinces and elsewhere. In regard to certain communities, however, in the United Provinces, Bihar and Bengal, and particularly in respect of big estates held by zamindars and talukdars, very intricate questions of custom involving protracted investigation are raised. So far as Oudh is concerned, as I said in my former note, the curse of Oudh has been and is the Oudh Talukdari Act I of 1869. It is an extremely obscure Act and practically every section of it has formed the subject of numberless decisions. A number of judicial officers in Oudh and a number of Their Lordships

of the Privy Council have time and again referred to the obscurity of certain provisions of that Act.

The outstanding fact, however, of Indian litigation outside the Presidency towns and certain commercial centres, such as Rangoon, Karachi, Delhi and Cawnpore, is that most of the litigation relates to land. Litigation in respect of land may take several forms. It may involve the determination of the rights of the parties under their personal laws such as the Hindu Law or the Mahomedan Law when issues relating to jointness or separateness of a family, or partition, or succession, or endowment, or adoption or alienation are raised; or it may relate to certain transfers such as those effected by sale, leases, mortgage, gifts or wills. This being the case, it is quite clear that an Indian civil suit, though looking on the face of it very simple, may yet be a very complicated one and may raise issues of a most varied character.

Machinery.

The machinery provided by the Government for the disposal of this class of litigation consists of various grades of courts. To take a normal Governor's Province for the sake of illustration. At the top is the High Court; below the High Court are District Judges; then come Subordinate Judges, and last of all come the Munsifs. This may be said to be true of Bengal, Assam, Bihar, the United Provinces and Madras. In Bombay they have got no Munsifs; but instead of Munsifs they divide their Subordinate Judges into first class and second class Subordinate Judges. In the Punjab, the system is now being more or less brought into line with the system prevailing in the United Provinces just referred to. I am not however entering into minute details about the various powers of the courts in the various Provinces; but I shall take, as I have already said above, a normal Governor's Province to develop this point.

High Courts.

The High Courts consist of a Chief Justice and a certain number of Judges. The Government of India Act provides [s. 101 (2)] that each High Court shall consist of a Chief Justice and as many other Judges as His Majesty may think fit to appoint. It lays down the qualifications of Judges. In order to be a Judge, you must be either a Barrister of five years' standing belonging to the English or the Irish bar, or an Advocate of five years' standing belonging to the Faculty of Advocates of Scotland; or a member of the Indian Civil Service, of not less than ten years' standing and 'having for at least three years served as, or exercised the powers of, a district judge;' or 'a person having held judicial office not inferior to that of a subordinate judge of a small cause court, for a period of not less than five years; or a person having been a pleader of a high court for a period of not less than ten years.' The Statute provides that not less than one-third of the Judges of a High Court, including the Chief Justice

but excluding the additional Judges, must be such barristers or advocates as aforesaid, and that not less than one-third must be members of the Indian Civil Service. In point of number the Calcutta High Court* has the largest number of Judges. There are—

* 1 Chief Justice.
14 Judges.
1 Additional Judge.

Chief Justice.	Judges.	Additional Judges.	
1	6	*nil*	in Bombay.
1	11	*nil*	„ Madras.
1	6	2	„ Allahabad.
1	6	2	„ Patna.
1	6	2	„ Lahore.

The jurisdiction of High Courts is laid down by their Letters Patent. The three Presidency High Courts, and the High Court at Rangoon, have got original jurisdiction. That is to say, they try original suits above a certain pecuniary value, the cause of action with regard to which ordinarily arises within the limits of the Presidency towns or the town of Rangoon. They have also appellate jurisdiction extending over the entire Presidency or the Province. The High Courts at Allahabad, Patna and Lahore have appellate jurisdiction, though each one of them also possesses extraordinary original jurisdiction. It is in regard to certain class of suits that they exercise original jurisdiction (*e.g.*, suits of matrimonial character between persons governed by the Indian Divorce Act, or suits relating to probate and administration). The Bombay High Court, under a special Act, exercises jurisdiction over Parsi divorces, though it would be more accurate to say that the Judge who tries Parsi divorce cases sits as special Judge. The Presidency High Courts have also got admiralty jurisdiction, and I think that the Rangoon High Court, too, has got a similar jurisdiction.

Subordinate Civil Courts.

So far as the subordinate civil courts are concerned, they are under the control and superintendence of High Courts. Section 107 of the Government of India Act provides that each of the High Courts has superintendence over all courts for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say:—

(*a*) call for returns;

(*b*) direct the transfer of any suit or appeal from any such court to any other court of equal or superior jurisdiction;

(*c*) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts;

(*d*) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts; and

(*e*) settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers of courts.

Provided that such rules, forms and tables shall not be inconsistent with the provisions of any (law) for the time being in force, and shall require the previous approval, in the case of the High Court at Calcutta, of the Governor-General in Council, and in other cases, of the local Government.

The Letters Patent of these High Courts also give them power of superintendence. At Allahabad one Judge is usually in charge of administrative work connected with the supervision of subordinate courts, though I believe other Judges, too, occasionally inspect them. I understand that in some other courts there are committees of Judges, but I have no personal knowledge of the manner in which inspection is carried out by those courts.

The usual mode of disposing of cases in the High Court is as follows: A single Judge exercises jurisdiction, the pecuniary limit of which varies from High Court to High Court. In some High Courts, for instance Allahabad, the pecuniary limit of the jurisdiction of a single Judge is Rs. 500. In some other courts I understand it goes as far as one thousand rupees. Under the Letters Patent, provision is made for an appeal to the court against the judgment of a single Judge. The word " judgment " in the Letters Patent has been the subject of a great deal of controversy. The Letters Patent appeals are heard either by a Bench of two Judges as in Allahabad, Patna or Lahore, or by three Judges elsewhere. This of course applies to cases disposed of by a single Judge in his appellate jurisdiction. In the Presidency High Courts appeals lie to the court from the judgment of single Judges on the original side. These appeals, I understand, are usually disposed of in Calcutta by a Bench consisting of three Judges. Similarly in the appellate High Courts where a Judge sits to dispose of a matrimonial or a probate suit, an appeal may lie to the court and it is disposed of by a Bench of two Judges. The rules of practice on this point vary from High Court to High Court.

District Judges.

District Judges are usually appointed from among the Indian Civil Service. I understand that the practice is that at an early stage of his career, a member of the Indian Civil Service makes up his mind as to whether he will continue in the Executive line or go to the Judicial line. It was the common belief at one time that the more promising and more ambitious among them used to prefer the Executive line. A certain number of District Judges are recruited by promotion from the Provincial Judicial Service. The number of such Judges varies from province to province. During the last few years in some provinces a few practising members of the Bar have been appointed directly to district judgeships.

As regards the work which these District Judges do, it must be borne in mind that they are also Sessions Judges and as such do a considerable amount of criminal sessions work and appellate work. It is very seldom that a District Judge tries an original

civil suit. Such original work as he does is in the nature of disposing of applications under the Guardian and Wards Act for the appointment of guardians; or the Succession Certificate Act for granting certificates for the recovery of debts due to the estate of a deceased person; or under the Lunacy Act for appointing committees for lunatics; or under the Insolvency Act for disposing of insolvency applications; or under the Probate and Administration Act for granting probate and letters of administration. All this is in the nature of miscellaneous civil work, and it is to my mind by no means very heavy work. In addition to this, he disposes of suits relating to charitable endowments under section 92 which sometimes imposes heavy work or suits for the removal of trustees under Act XX, 1863; or cases under the Land Acquisition Act when there is a dispute with regard to the amount awarded by a Collector for compulsory purchase of land, or when there is a dispute as to the division of the money between rival claimants. Then the District Judge is supposed to do some appellate work. All appeals from munsif's decisions in all classes of suits and civil proceedings lie, in the first instance, to the District Judge. All appeals from the decrees and orders of subordinate judges in civil suits and proceedings the value of which exceeds Rs. 5,000 also lie in the first instance to the District Judge. A good many of the appeals from the munsif's judgments, where there is heavy criminal work to be disposed of or where perhaps the District Judge does not like civil work, are transferred to subordinate judges or additional judges. Appeals from the subordinate judges, too, are not infrequently transferred to additional judges. I may note here that an additional judge has under the law the same powers as the district judge has, except that the latter has got the right of transferring cases from his court to the former. The District Judge is also in many provinces the District Registrar under the Registration Act.

Subordinate Judges.

Subordinate Judges in some provinces like the United Provinces, Bengal, Assam, Bihar, Madras and Bombay, are invariably men who were recruited originally as munsifs from among the pleaders of certain standing. The rules of recruitment of the provincial judicial service are not uniform but the general feature is that a recruit must have taken a law degree or passed the vakil's examination and practised for about two or three years. Only recently I understand the rule about practice has been dispensed with by the Allahabad High Court. In the Punjab I understand there is yet a very large number of subordinate civil officers such as munsifs and subordinate judges who do not possess any legal degrees and who do not belong to the legal profession. It is generally after 10 to 15 years of service as a munsif that an officer is appointed a subordinate judge, and when once he is appointed a subordinate judge his jurisdiction in the provinces of Bengal, Assam, Bihar, the United Provinces and Madras is un-

limited. He can try suits of any value. The minimum value of a suit which should be filed before him is, ordinarily speaking, above Rs. 1,000. But in certain provinces munsifs either generally or by selection have powers to try suits up to the value of Rs. 2,000 or Rs. 3,000. Appeals from the subordinate judges' decisions in suits and proceedings of the value of above Rs. 5,000 lie direct to the High Court both on facts and on law. Appeals from suits and proceedings valued up to Rs. 5,000 lie to District Judges.

Munsifs.

The lowest grade judicial officer in Bengal, Assam, Bihar, United Provinces and Madras is the munsif whose pecuniary jurisdiction ordinarily extends up to Rs. 1,000 but in some provinces, as already pointed out above, the jurisdiction may go up to Rs. 3,000. I have already referred to the method of the appointment of these munsifs. Excepting perhaps the Punjab, they are invariably B.A., LL.B.'s, or B.A., B.L.'s. In the foregoing paragraph I have traced the constitution and the powers of the various grades of courts in some principal provinces of India.

Quality of Judges.

As regards the quality of judicial officers in the provinces, the view that I have formed in my province and which I believe is shared by lawyers is that civilian district judges are quite competent to deal with questions of fact, though in many instances their knowledge of law leaves much to be desired. On the other hand, it is only fair to say that I have come across some of the civilian district judges who have shown great competence in legal knowledge. As regards the subordinate judges, I think that, taking them as a whole, they are a very competent body of officers, and certainly in Bengal, Bihar, Bombay, the United Provinces and Madras they have reached a high standard of efficiency. One difficulty about them is that they are so overworked that they are not able to spare time to keep abreast of the growing literature of law. Another defect which I am bound to point out is that they are in many cases inclined to take a very technical view of things. This may be accounted for by two or three reasons. In the first place, it is a matter of common knowledge that in the subordinate courts in India, the tyranny of case law is supreme and not much discrimination is shown in the application of case law. In the second place, the average legal practitioner in the subordinate courts who has got to conduct and argue a case before the subordinate judge is himself a very technical person. He is not disposed to take a broad view of things and so far from relying on broad principles, he is disposed to take a very narrow view of facts and the law, and thus creates an atmosphere of narrowness about our judiciary. It seems to me that one of the baneful consequences of codification in India has been to subordinate the spirit to the letter of the law, and nowhere more than

in matters of procedure one sees the manifestation of this spirit of narrowness. It is true that in some early decisions the Privy Council observed that the courts in India should constantly bear in mind that by their very constitution they were expected to decide according to equity and good conscience and that it was the substance and merits of the case and not the form which should always be borne in mind (see for instance VI. M. I. A. pp. 410-411). But actual experience has convinced me that nowhere more than in the application of the principle of equity and good conscience do our subordinate courts and the Mofussil Bar fail. In one well-known case Lord Penzance (L. R. 4 Appeal Cases, p. 525) observed as follows:—

> "Procedure is but the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct and even to extinguish the legal rights, and is thus made to govern where it ought to subserve."

I am afraid these wholesome principles are very often forgotten: the result is not very creditable to the administration of justice in certain class of cases. The same remarks apply more or less to the munsifs.

Probity of Provincial Judicial Service.

I have been assured by men who know it that the provincial judicial service in Bengal, Assam, Bihar and Madras is absolutely clean. There have unfortunately been some cases of corruption in the United Provinces, but Sir Grimwood Mears, the Chief Justice, has taken strong action, which has brought about the dismissal of some of the judicial officers. As regards the Punjab I have no direct knowledge, but I am bound to say that I have not heard very creditable accounts of the subordinate judiciary in the Punjab.

Procedure.

Our law of procedure is contained in the Code of Civil Procedure, which was passed in 1908. The first attempt at codification was made in 1859 when a rudimentary Civil Procedure Code was passed. The second attempt was made in 1877; and the third attempt was made in 1882. The present Code is modelled more or less on the English procedure. There are 158 sections in the Code itself and there are schedules attached to it containing various orders and rules. One of the leading features of the new Code is that it provides that nothing in this Code shall be deemed to limit or otherwise affect the inherent power of a court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. This, to my mind, is a very salutary section and if used properly and with discretion should enable subordinate courts to put down many of the abuses of the process of the court for which there is no express provision elsewhere in the Code. I have, however, found much reluctance on the part of

courts to make use of this power. It may be due to the fact—and that has been put to me by some subordinate judges—that they do not feel sure whether the exercise of this power by them under this section would be supported by High Courts. I am myself inclined to think that by habit and training they have been so much accustomed to follow the letter of the law that they feel either nervous or unwilling to take any strong action, with a view to put down abuse of the process of the court. Another important feature of the present Code is that Part X of the Code of Civil Procedure gives the High Court power to make rules regulating their own procedure and the procedure of civil courts subject to their superintendence and also the power to annul, alter or add to all or any of the rules in the first schedule (*vide* section 122). There is provision for a rule committee and section 128 tabulates the matters for which provision may be made by rules. High Courts had laid down rules for the guidance of subordinate courts even before the present Act came into force, but I am bound to point out that many of those rules related to matters of detail more or less of an administrative character. I have noticed some reluctance on the part of High Courts to take full advantage of the power which this part of the Code of Civil Procedure gives to them. I personally think that a good deal of the abuse of the present system of work in the subordinate courts could be effectively checked if we could persuade the High Courts to avail themselves of the power given to them under this chapter. I may point out that only last year it was brought to my notice that no rule committee had been appointed by the Calcutta High Court although the Act has been in existence for so many years.

Some of the abuses.

The very first abuse to which I shall invite attention is the extraordinary delay which takes place in the service of process. Service is effected through process-servers who are peons getting very small and paltry salaries, and it is notorious that you cannot get a process served without bribing the subordinate staff and the process-server. It is equally notorious that if the person on whom the process has to be served wants to avoid or evade the service of process, he can do so easily by bribing the process-server and getting him to give a false return. A considerable amount of delay no doubt takes place also because of transport difficulties in the interior. The territorial jurisdiction of the Civil Courts is in some provinces, and particularly in some districts, very large, and it is not always very easy, even with the most honest process-serving staff, to get processes served with promptitude. I have heard it suggested that courts of law should make greater use of postal service. How far this can be effected is a question which must be examined in conjunction with the postal authorities. Again, it must be borne in mind that the array of parties to suits in India is very often amazingly large. So many interests are involved and so many transfers take place with regard to the same property that very often we find a very large number of defendants impleaded to

suits. When I left the profession, I had a case pending in which over 1,200 persons were defendants and it was extremely difficult to get on to a hearing because of the difficulties which arose with regard to service on the original defendants or the representatives of those who died after the institution of the suit. We have got in the Code of Civil Procedure a rule to the following effect (Order I, rule 8):—

> "Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct."

The expression "same interest" has formed the subject of many judicial decisions. In a decision in England in the case of *Duke of Bedford *versus* Ellis, Lord Macnaghten is reported to have observed as follows:—

* (1901) Appeal Cases, p. 1 at page 8.

> "Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the complainant proposed to represent."

The Madras High Court have recently held that the disciples of a Mutt have sufficient interest within the meaning of this rule to maintain a representative suit, to declare an alienation made by the Mahant invalid and have the property alienated handed over to the Mahant (I. L. R. 41, Mad. 124). This, however, will apply only to suits in which there is multiplicity of plaintiffs, but I do not think that it is easy enough to deal with cases where there is multiplicity of defendants. One very common class of cases in India is where a qualified owner such as a Hindu widow makes alienation of different fractions of the same property to a number of persons who in their turn transfer the same property to various other persons, and a suit is brought by a reversioner on the death of the widow, to set aside those alienations. It is, to my mind, difficult to say, having regard to the doctrine of legal necessity, that the interest of one defendant is necessarily the same as that of the other defendants. I have mentioned this only to show that in my opinion the law requires to be revised, and there seems to me to be some necessity for making provision for extending the scope of representative suits, subject to certain safeguards in our Code.

Another serious difficulty which is responsible for unnecessary waste of time, especially in subordinate courts, is that, in spite of the fact that an educated Bar has now come into existence and the Code of Civil Procedure now makes special provision for precision

and definiteness in pleadings, courts of law are generally too indulgent in the matter of pleadings. In the early days of British rule the Privy Council observed in a number of cases that pleadings should not be strictly construed in India. I think there was good reason for that, because at that time a trained Bar did not exist in the Mofussil; but that reason has ceased to exist, and I see no reason why stress should not be laid by courts of law upon pleadings being drawn up with precision and accuracy, and why parties should be allowed to travel beyond their pleadings during the trial.

Apart from this difficulty about pleadings, there is another omission of which the subordinate courts in the Province of Agra, with which I am familiar, are almost invariably guilty. They very seldom follow the Code of Civil Procedure in the matter of the opening of a case. They have inherited the notion from olden times that it is a waste of time to have a case opened by Counsel. The result of this is that it is very seldom that one comes across a trial Judge, who during the trial of the case knows precisely what the points at issue are and who can give decision on the spot as to whether a particular evidence sought to be introduced in the case is or is not relevant. I have come across a number of subordinate judges who are in the habit of disposing of questions of relevancy or admissibility raised during the trial by the convenient formula "admitted subject to objections at the hearing." On various occasions strong objection has been taken by the High Court to this slovenly practice; but I am afraid it has had little effect. Indeed matters have come to such a pass that documentary evidence which is produced by the parties in the case is sometimes 'exhibited' after the oral evidence is over and after parties have argued out their case. If subordinate judges are unable to put down this irregularity on the part of pleaders who ordinarily practise before them, I am afraid they are equally unable to deal with senior Counsel who in big cases are taken down before them from the High Court. Another important feature of Indian litigation which requires to be carefully borne in mind is the inveterate habit of litigants and pleaders to seek adjournments. In some cases undoubtedly adjournments may be justified but in the vast majority of cases an application for an adjournment is made in order to gain time. The usual grounds on which an adjournment is applied for is that summonses have not been served on certain witnesses or that some commissions issued by the court for the examination of certain witnesses outside the jurisdiction of the court have not been returned. Some subordinate judges no doubt show strength in dealing with such applications for adjournments, but I should think a good many of them are a little too indulgent. I think our law requires to be stiffened in respect of this matter and there should be a clear provision that within a certain time which may be necessary for the preparation of the case, the parties must get ready and when once the case is put on board, it should not be adjourned except for very strong and cogent reasons and the trial should proceed *de die in diem* until it is closed.

As I pointed out in my previous note a great deal of delay takes place when accounts are referred to a commissioner. In many commercial and mortgage transactions in this country and also in many suits relating to land (*e.g.*, relating to the partition of a joint family estate or adoption) the best evidence is furnished by written accounts. There is nothing more common than the tendering of a large number of books in such cases. I think this lends itself very easily to gross abuses. This part of our law seems to me also to require revision.

I also suggested in my former note that it is also a question for consideration whether the provisions of Order 37 of the Code of Civil Procedure, which prescribe summary procedure for cases relating to negotiable instruments more or less in accordance with English practice, should not be extended to subordinate courts. As the law stands at present it applies only to the High Courts of Calcutta, Madras and Bombay, to the Chief Court of Lower Burma and the court of the Judicial Commissioner of Sind. I think the time has come when it should be extended to important towns in every province. For instance in the United Provinces I would extend Order 37 to places like Cawnpore, Aligarh, Benares, Lucknow, Meerut and Moradabad. And here I may point out that in certain parts of India, where at one time commercial cases were practically unknown, a good deal of commercial litigation is springing up. In the United Provinces in my own time commercial litigation in certain centres has considerably increased. I consider it is unfortunate that these cases should be tried by subordinate judges who have had no training in commercial law. The result is that these cases are tried with the elaboration with which land suits are tried. It will probably be for local Governments to consider whether they should not employ trained commercial judges at such centres. I think if local Governments could be persuaded to send one or two subordinate judges on deputation to England for a short time to watch the practice and procedure of commercial courts, they should be able to deal with this class of litigation better.

I have very often heard it said that our Indian Code is far too indulgent in the matter of appeals and that cases are prolonged by reason of appeals filed from interlocutory orders, not with the object of getting a decision of any interlocutory order which matters but with the object of indirectly securing the postponement of the trial of the case. I confess that I have come across this sort of abuse. On the other hand, it seems to me that any drastic changes in the matter of appeals in this country are bound to provoke a great deal of resentment. When there is a first appeal filed, it is open to the appellant to challenge the findings of the court from whose decision the appeal is filed both on facts and on law. But it is not so in the case of second appeals. A second appeal can only lie on the grounds mentioned in section 100 of the Code of Civil Procedure; (1) that the decision of the court below is contrary to law or to some usage having the force of law; (2) that the decision has failed to determine some material issue of law or usage having

the force of law; and (3) that a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force may possibly have produced error or defect in the decision of the case upon the merits. I cannot say that the High Courts are very indulgent in the matter of admission of second appeals. At the same time it seems to me that in some courts not much responsibility is laid upon counsel or pleaders filing such appeals. I believe the Calcutta High Court require a certificate from the pleader filing an appeal that the point which he has raised in the case does genuinely arise in it. That is not the practice in Allahabad. I think some such practice should be uniformly adopted. I confess that I am not in favour of a certificate being granted by the subordinate courts for the purposes of an appeal. It is also a question for consideration as to whether the right of appeal in regard to certain orders (and I use the word "orders" in the sense in which it is used in India) should not be refused. In this connection I would draw particular attention to section 104 and Order 43, rule 1 of the Code of Civil Procedure. It is possible that upon a careful examination of these two provisions it may seem necessary to cut down a few clauses and substitute a few others for the purposes of an appeal: I do not think that it is necessary for me in this note to go into those details.

I have hitherto refrained from taking up two big questions which relate to the execution of decrees; and to local, tribal or family customs. I shall first take up the Execution of Decrees. So far as our law relating to execution of decrees is concerned, it is contained in Order 21 of the Code of Civil Procedure. It consists of 103 rules. Decrees in India for the purposes of execution may roughly be said to be divided into the following classes:—

(1) money decrees,
(2) mortgage decrees,
(3) partition decrees,
(4) declaratory decrees,
(5) decrees for specific performance,
(6) mandatory decrees, for instance, decrees which require something to be done or not to be done,
(7) decrees requiring personal obedience.

I do not think that this is an exhaustive description of decrees. It is specially when a decree has to be executed against certain immovable property that trouble arises. Here, it must be borne in mind that there is no such thing as registration of title in this country. So far as zamindari property is concerned, there are certain entries in the revenue papers but these entries are only *primâ facie* evidence of the title and they are always open to challenge; nor is there always any certainty about the extent or the boundaries of every property. The system is further complicated in the case of Hindus by the law relating to joint Hindu family. The fact that a certain person's name happens to stand against a certain property in the revenue papers does not preclude the possibility of

there being other co-proprietors who are joint with him. The name of a person may be regarded in revenue papers as the head or manager of a joint family without any description to that effect, and if the decree happens to be only against that particular individual and the decree-holder seeks to attach that property the other co-partners then challenge the validity of that decree on various grounds open to them under the Hindu law. Similarly, it very frequently happens that the name of a Hindu widow is entered in the revenue papers, and when a decree-holder seeks to execute the decree against that property, other people come forward and urge that the widow's name was entered only for what is technically known as consolation. I could illustrate the same sort of difficulty with reference to Mahomedan law. I am not overlooking the element of corruption which prevails more or less among the subordinate staff who are in charge of the execution of decrees. Even though we might take some steps to eliminate that element, it seems to me that the whole system of execution of decrees is so closely bound up with the personal laws of Hindus and Mahomedans that unless some strong steps are taken to remedy some of the outstanding defects of those laws, I think a mere revision of this chapter will not lead to any abiding results.

In regard to matters of procedure connected with the execution of decrees, I would particularly draw attention to a few matters which seem to me to call for consideration. It seems to me that the third party procedure calls for some simplification. Objections are filed by the third party under Order 21, rule 58, and the decision on these objections is almost invariably followed by a regular suit. This seems to me to require some consideration. Then again a greater degree of precision should be insisted upon in regard to the contents of proclamations issued for the sale. For, it seems to me that a large number of applications which are filed in civil courts to set aside sales held in the execution of decrees are based on the ground of irregularity or illegality, and they might be stopped if more care was taken at the initial stages. This would entail an examination of rules 64, 72, 82, 83 to rule 93.

The system of granting certificates to purchasers also calls for revision. A great deal of trouble arises from the slovenly manner in which sale certificates are drawn up and questions are frequently raised as to the extent of transfer effected by a sale certificate.

The one outstanding feature of the law of execution in India is the leisurely manner in which a decree may be executed. Article 182 of the Law of Limitation provides for the execution of a decree or order of a civil court; the period of limitation prescribed for the execution of a simple decree is three years or where a certified copy or decree has been registered, six years. I confess that this looks very simple, but when the third column of the schedule is borne in mind, then it will appear what a complicated system we have provided. It will probably interest His Excellency to know that on this seemingly innocuous provision the rulings of the various High Courts as summarised in the latest edition of Rustomji's Law

of Limitation cover something like 75 closely printed pages. I have always felt that these provisions are a standing temptation to dishonest decree-holders and dishonest judgment-debtors to trouble, annoy and cheat each other and to prolong execution at their will and pleasure by taking shelter behind a thousand and one pleas which legal technicalities can raise. To discuss each one of the clauses separately seems to me to be out of question in this note. But what I would urge is that we should make a clean sweep of all these stages and definitely fix a time limit within which a decree must be executed, making provision only for extension of time in the discretion of the Judge when it is established to his satisfaction that the execution of a decree could not be had owing to the fraud of the judgment-debtor or the negligence of the executing staff.

In order to put down obstruction on the part of obstinate and dishonest judgment-debtors perhaps it may be necessary for us to devise some effective system of equitable execution by taking over the property in the custody of the court by the appointment of a receiver or some other officer charged with the duty of administering the judgment-debtor's estate and satisfying the claims of the decree-holder. No doubt, there are provisions for the appointment of receivers in the Code of Civil Procedure; but it seems to me that there is room for their revision and the extension of their scope. These are purely tentative suggestions which I have made and which I have no doubt will be carefully considered and examined later on.

I may here state that so far as partition decrees relating to zamindari property are concerned the actual partition is effected not by the civil courts but by the revenue courts. This is probably due to the fact that the revenue courts have more direct and intimate knowledge of the zamindari property and they can also more effectively safeguard the interest of the Government in regard to the collection of revenues. This procedure involves considerable delay.

I have referred above to the difficulty which arises in Indian litigation by reason of our customary law. These mostly arise in cases of inheritance or succession or adoption under the Hindu Law. For instance, in some cases of succession it is pleaded that daughters are excluded by custom from inheritance. In others, it is pleaded that the estate in question is by customs heritable by the rule of primogeniture. The latter class of custom is very frequently set up in Oudh, Bihar and Bengal. It is in this class of cases that not only a mass of documentary evidence is tendered but a very large number of witnesses over a large area, sometimes over several provinces, are examined on commission. These cases take extraordinarily long time. I understand that an attempt was made some years ago in the Punjab to codify the law relating to custom. Great difficulties were then felt in achieving satisfactory results, but it seems to be that the position in the Punjab is very peculiar. There we have got to deal with small agricultural communities and both Hindus and Mahomedans are affected by their local tribal customs. The task however of legislation in provinces like Bengal, Bihar, the

United Provinces and Madras should not be so difficult or so stupendous. I have in view big zamindaris and talukdaris which very frequently form the subject of litigation in various provinces. It should not, to my mind, be difficult to make an investigation about the titles of these big estates and the rule of custom applicable to them and then to introduce legislation in the provincial councils. This of course is a matter for provincial governments. Legislation of this kind has for long been suggested in some of the provinces but no serious attempt has so far been made. I believe Sir Bhashyam Aiyangar, one of the foremost lawyers and judges of his day, was responsible for a Bill relating to impartible estates in Madras. Perhaps the better course would be to suggest to the local Governments to appoint committees to explore the possibilities of such a legislation with regard to big estates within their jurisdiction.

I shall now summarise the suggestions that I have to submit on the whole question:—

(1) In my opinion, it is necessary that the inspection of the subordinate courts by the High Court should be carried on more vigorously and more regularly. This may in some High Courts involve the appointment of additional judges, but in my opinion the appointment of one additional judge to each High Court, whose business it will be to be constantly inspecting the working of the subordinate courts, will not be a waste of money.

(2) We must seek the co-operation of the High Courts and invite their attention to the desirability of using their powers under the Code of Civil Procedure for revising their rules for the guidance of the subordinate courts, with a view to putting down the abuse of legal process.

(3) In my opinion, the Code of Civil Procedure and the Law of Limitation should be carefully revised so as to secure expedition of work and the putting down of frivolous litigation and obstructive and dilatory proceedings.

(4) It is of the utmost importance that we should insist on a higher standard of probity among the subordinate staff attached to the courts, particularly those who are charged with the execution of decrees. In my opinion, the subordinate staff is not adequately paid and there are temptations in their way to which they easily succumb. This will no doubt involve the local Governments in further expenditure, but I think it is inevitable if we desire to secure efficiency, honesty and expedition.

(5) So far as commercial cases are concerned, I think we must strengthen the commercial courts by appointing trained judges and we must also simplify the procedure for the trial of commercial cases. As regards the training of these judges, in the mofussil, I would suggest that the experiment of sending a few selected subordinate judges or district judges to England for receiving their training in commercial law and practice should be commended to the notice of local Governments.

(6) It should be seriously considered (and I referred to this in my previous note) as to whether we should not pass legislation against champerty. In India we have too long allowed the law as laid down by the Privy Council in different conditions to obtain among the people of this country who have more or less outgrown those conditions.

(7) We must explore the possibility either of securing more satisfactory entries in revenue papers or stiffening our law of evidence as to the presumption arising from such entries.

(8) I think it would be necessary to stiffen our law of registration also. There is not to my mind sufficient solemnity attached to a registered instrument in India and parties may go easily behind registered instruments.

(9) Legislation with regard to dishonest pleas which are open to parties under the Hindu or the Mahomedan law might well be taken in hand. This will no doubt provoke criticism about interference with the personal laws of the Hindus and Mahomedans, but I think that upon a dispassionate view, it will be found that it does not involve any interference with religion at all. In this connection I would suggest the desirability of considering whether we should not have legislation in this country on the lines of the English Vexatious Suits Act.

(10) In regard to big estates, I feel very strongly that the time has come when provincial Governments should be invited to undertake legislation on the lines suggested above.

CHAPTER 1.

Number of suits before the Civil Courts in India. Causes of delay in disposal of uncontested suits. Suggested remedies.

1. In the year 1922, there were just over two and a half million original civil suits for trial in the regular courts of India. This figure does not include suits decided by village and panchayat courts, nor does it include suits tried under the Rent Laws except in the courts in Bengal, a part of Assam, Bihar, and the Central Provinces. Rent suits are not, however, tried by the civil courts in Chota Nagpur and Orissa and certain backward tracts in Bengal and Assam. The actual number of suits of a civil nature which came up for decision was considerably greater. About 198,000 suits were tried by village and panchayat courts, and about 755,500 were tried by special revenue courts in other parts of India in that year. Out of the suits for decision before the regular civil courts just over two millions were decided, leaving something over half a million undecided. The following table gives particulars:—

Table showing the number of suits under ordinary and small cause court procedure before the civil courts in 1922, with numbers decided and pending at the close of the year. These figures do not include suits before village and panchayat courts, and include suits under Local Rent Acts only in Bengal, Assam and Bihar and the Central Provinces.

Province.	Number of suits before the courts.	Number decided.	Number of suits pending at end of 1922.	Percentage of arrears to total number of suits.
Bengal	845,032	658,728	186,304	22·04
Assam	48,523	38,159	10,364	21·35
Bihar and Orissa	240,973	165,442	75,531	31·34
Madras	414,294	328,545	85,749	20·69
Coorg	3,357	2,797	560	16·68
Bombay	221,274	155,120	66,154	29·89
Sind	36,933	27,597	9,336	25·27
Agra	188,459	160,894	27,565	14·62
Oudh	81,980	70,689	11,291	13·77
Punjab	247,998	190,187	57,811	23·31
Delhi	11,604	8,708	2,896	24·92
North-West Frontier Province	32,023	27,591	4,432	13·84
Burma	77,439	68,832	8,607	11·11
Central Provinces and Berar	157,163	125,056	32,107	20·43
Total	2,607,052	2,028,345	578,707	22·19

The figure of the total arrears is not of great assistance towards understanding the state of delays. To realise the position of litigants, it is necessary first to divide these decisions into two classes—suits decided (*a*) without contest and (*b*) after contest. The following table shows the figures:—

Table showing number of suits under ordinary and small cause court procedure decided in 1922 by regular courts (excluding village and panchayat courts) (a) without contest, (b) after contest, with the percentages that the number of suits decided after contest bear to the total number of decisions.

1	2	3	4	5
Province.	(*a*) Number of suits decided without contest.	(*b*) Number of suits decided after contest.	Total number of decisions.	Percentage of decisions in contested suits to total decisions (col. 3 to col. 4).
Bengal	581,488	77,240	658,728	11·72
Assam	32,789	5,370	38,159	14·07
Bihar and Orissa	136,102	29,340	165,442	17·67
Madras	219,727	108,818	328,545	33·12
Coorg	2,236	561	2,797	20·05
Bombay	98,322	56,798	155,120	36·61
Sind	23,748	3,849	27,597	13·94
Agra	121,635	39,259	160,894	24·40
Oudh	52,826	17,863	70,689	25·23
Punjab	135,267	54,920	190,187	28·87
Delhi	3,369	5,339	8,708	61·31
North-West Frontier Province.	15,055	12,536	27,591	45·43
Burma	51,719	17,113	68,832	24·84
Central Provinces and Berar	97,738	27,318	125,056	21·84
Total	1,572,021	456,324	2,028,345	22·44

It will be seen from it that nearly four out of five of the suits decided were uncontested.

2. The first object to be attained in respect of all suits is to bring the parties before the court as soon as possible, or to give them an opportunity so to appear. When the parties have been given a full opportunity of appearing before the court, uncontested suits should—and in most cases can—be decided forthwith without a single adjournment. The parties are not brought before the courts as soon as possible, and uncontested suits are not always decided forthwith. The delay in deciding uncontested suits is very remarkable in some courts. In most provinces the disposal of uncontested work is capable of considerable improvement.

3. The word "uncontested" requires explanation. It does not bear the same meaning in the annual reports from all parts of

India. In some provinces a suit is classified as uncontested if there has been no contest at any stage; in other provinces a suit is classified as uncontested, if the contest is withdrawn at any period. For example, a suit in which there has been keen contest, and which has terminated in a compromise or a withdrawal after a trial of over two years, would be classed in the former provinces as contested and in the latter as uncontested. Where only those suits are classified as contested which have terminated in contest, the figures of uncontested suits are increased, and the duration becomes greater.

4. The duration of either contested or uncontested suits as recorded in the reports is not instructive. No comparison can be made effectively between the figures of duration, since they are prepared in a different manner in different provinces. In some provinces the practice is to calculate the duration from the date of institution to the date of decision, and in other provinces duration is calculated from the date on which a suit returns for re-hearing to the date of decision. In the first named provinces, if a suit is decided after three years, then goes on appeal to a higher court, is returned for re-hearing after three years more have elapsed, and decided finally six months afterwards, the duration is calculated as six years and six months. In the second named provinces the duration is calculated as six months only. Instances are rare in which this want of uniformity can affect uncontested cases, but there will be a few. For example a suit may be dismissed for default, and decided on admission after restoration. Some provinces would record the duration from the date of original institution and others from the date of restoration.

5. We consider the following causes responsible for the avoidable delays in the disposal of uncontested suits.

Under the rules framed according to the provisions of the Code of Civil Procedure all suits commence with the presentation of a plaint. A copy of this plaint (or a concise statement) and a summons to appear on a certain date in person or by a pleader are sent for personal service on the defendant or defendants, usually by the hand of a paid process-server. Service through an agent may be accepted, and the rules permit substituted service (by proclamation, or advertisement in a newspaper, or in any other manner) in special circumstances, when it has been found impossible to effect service personally or through an agent. In no part of India is service effected as speedily as it should be.

6. There is usually delay before the process fees are deposited and the copy of the plaint or concise statement which is to be served on the defendant is filed. Time is lost in issuing summonses. Nowhere is the machinery so efficient, as to ensure that the summons will be made over to the process-server on the date that the process fees are paid. The time lost here is, however, a matter of days rather than of weeks. Once the process is handed over, other causes of delay come into being.

7. In some provinces the process-server waits until the party desiring service provides a person to identify the party on whom

the process has to be served. In all provinces the process-server is inclined to dawdle over his duty, and does not return the process as expeditiously as he might. The next cause of delay is more serious. Frequently the party on whom the summons is to be served makes every attempt to evade service. The news that a process-server is in the neighbourhood spreads rapidly either in town or country, and more often than not the name of the recipient is bruited abroad as soon as the process-server is observed in the neighbourhood. So the party on whom the summons is intended to be served has a good chance of knowing, before the process-server arrives, that a summons is near. If he wishes to evade personal service, he can slip out of the way, and his neighbours can frequently be trusted to display a blank ignorance of his residence or even of his existence. Disinclination to accept service is not confined to India. An equal disinclination is manifested frequently in England, or anywhere else in the world. But the difficulty is accentuated in India by the following facts. In England a lawyer's clerk or a county court officer can be trusted to use his best intelligence to circumvent the person who seeks to evade service. In India a process-server will, unless under effective supervision—such supervision does not usually exist—take no interest in the matter. He will at the best make some show of endeavouring to effect service, and after a minimum effort will proceed to his next destination. Further, it is not unknown, even when the process-server has come face to face with the recipient, for the recipient to persuade him to accept a gratification and report non-service. Thus in many instances the process is returned as unserved, where by the exercise of reasonable diligence and with honesty it should have been served personally.

8. Another cause of delay is to be found in the disinclination of certain presiding officers to certify service as sufficient when it is made in any manner except by actual personal service. The rules lay down that, where it is practicable, service shall be made on a defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient. The rules continue, however, that where the defendant cannot be found and has no agent empowered to accept service on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him. In many cases the courts refuse to accept service made on such adult male member of the family. Under the rules if the defendant, or his agent, or such adult male refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant or any other person on whom the summons can be served on his behalf, service can be made by affixing a copy of the summons on the outer door or some other conspicuous part of the defendant's house. In such a case, it is sufficient for the serving officer to bring back the original summons to the court with a report to the effect that the copy of the summons was affixed in this manner. In ordinary circumstances, the affixation of a summons should be sufficient to bring to the notice of the

person, whom it is desired to serve, the date of hearing and the nature of the claim against him. It is only in exceptional circumstances that service effected in this manner should be regarded as insufficient. It is not unknown for presiding officers to refuse to accept such service as sufficient in any case, and their failure to take action upon notices served in this manner causes considerable delay in the disposal of all cases and particularly of uncontested cases.

9. There are certain special difficulties in India which cannot be avoided easily. In many parts the process-servers have to proceed very considerable distances to the places where the service has to be effected. Means of communication are sometimes incredibly bad. Good railway communication is rather the exception. Roads may be non-existent. Forest and jungle may have to be traversed. Flooded rivers may have to be crossed. In the Sunderbands it may be necessary to serve a process in a village which can be reached only after nine or ten days' journey in a boat. In Burma, particularly in Upper Burma, hundreds of miles of desolate country may have to be traversed. The same difficulty as in Burma arises in Bundlekhand in the south of the United Provinces, and in many other tracts.

10. The number of parties to be served in certain suits is very great. In India institutions are frequently postponed, till the period of limitation has almost expired. The result not uncommonly is that one of the persons, against whom the cause of action originally arose, is dead, and a number of representatives have to be served in his place. The number of such representatives is likely to be considerable, when the deceased is a Hindu or a Muhammadan. There are also suits where a very large number of defendants are impleaded as having a common interest in the subject matter. This number can be so large as to become absolutely unwieldy, when the subject matter is landed property. We discovered a suit in the United Provinces where there were 1,004 defendants and a suit in the Punjab where there were 1,111 defendants.

11. The provisions of Order I, Rule 8, permit the court to issue notice by public advertisement in cases where a very large number of persons have the same interest in the suit, and where personal service is not reasonably practicable. The provisions of this rule are not always utilized in cases in which the rule is applicable. But this rule is frequently inapplicable (as in the cases above mentioned) and it becomes necessary, as the law stands, to issue notice for personal service on a very large number of parties.

Suits of the latter nature are, of course, hardly likely to be other than contested. There are, however, many small uncontested suits in which it is difficult to avoid delay in giving all the parties an opportunity of appearing before the court.

12. There is further always delay to be expected where a defendant is a minor, for there it is necessary to appoint a guardian ad-litem who is competent and ready to represent.

13. There are certain suits, in which the parties to be served reside outside the jurisdiction of the court of trial. Notices have then to be sent to be served by the courts, in whose jurisdiction these parties reside, and much delay is caused by the lack of energy displayed too frequently by the courts entrusted with the service. It is a regrettable fact that such foreign processes receive, more often than not, scant attention from the courts entrusted with their service. Suggestions can be made here for improvement. Greater powers should be given to use the registered post for this purpose in British India, and more effective co-ordination should be enjoined upon all courts concerned. The High Courts to which they are subordinate should supervise their work in this respect.

14. The work in disposal of uncontested suits would improve appreciably if the following measures were adopted. Rules should be made, where they do not exist, that all necessary copies of plaints to be served on defendants should accompany the plaint, and that the process fees should be paid on the date of the presentation of the plaint. The rules should not permit extension of time for the purpose except in very unusual circumstances. A date should be fixed for appearance as soon as a plaint is presented and that date should be fixed shortly after the earliest possible date, on which the processes are likely to be returned by the serving officer.

15. A new form of summons is required—at any rate in some provinces—in addition to the forms already in use, whereby the defendant would be called upon to appear merely for the purpose of stating whether he does or does not contest the claim, and, in event of contest, of receiving directions as to the date on which he has to file his written statement, date of trial, and other matters. It may be taken as a fact that (except in suits tried under the provisions of the Provincial Small Cause Act and rent suits in Bengal and Bihar, in which there may be no occasion to use such a summons) nothing is usually done in a contested suit on the date first fixed for hearing. If the summons be a summons for disposal the parties in cases of contest are usually not ready. If it is a summons for settlement of issues, the defendant is usually not ready with his written statement. Thus the use of the present forms of summons effects no appreciable expedition in the decision of contested suits, while it causes considerable delay in the disposal of uncontested suits. The first object to be attained at the first hearing should be the knowledge whether the suit is contested or uncontested. If it is uncontested, it should be decided at once. If it is contested, the delay involved in the issue of a notice for appearance should be very slight. It would be sufficient after hearing briefly the defendant to fix a date for filing a written statement (if necessary) and insisting that on that date issues should be framed or the suit should be decided finally.

16. The questions of improvement in the recruitment of process-servers, their better supervision, the conditions regulating the effectiveness of service, and proposed alterations in methods, will be discussed again. This much may be said at the beginning. Under-paid and uneducated process-servers will never do really

satisfactory work. Further, however much the qualifications of the process-servers may be improved, there will always be need for methodical distribution of work, intelligent fixing of dates, and efficient supervision. Improvements in the recruitment of the process-servers, their discipline and supervision over them are needed all over India. In some provinces the need is greater than in others.

17. The mass of uncontested suits are decided, as might be expected, by the small cause courts and the courts of lowest jurisdiction. The figures in the following table show the institutions in 1922 classified by valuation:—

Table showing institution of suits under ordinary and small cause court procedure in 1922 in all civil courts other than village and panchayat courts, classified according to valuation.

Province.	Rs. 1—50.	Rs. 51—100.	Rs. 101—500.	Rs. 501—1,000	Over Rs. 1,000.	TOTAL.
Bengal . .	353,098	120,339	128,374	15,226	13,965	631,002
Assam . .	18,380	8,517	8,425	843	558	36,723
Bihar and Orissa	91,311	27,551	34,338	5,359	5,162	163,723
Madras . .	86,118	81,405	114,983	15,439	14,771	312,716
Coorg . .	1,518	705	640	52	64	2,979
Bombay . .	42,819	32,372	54,801	9,988	10,015	149,995
Sind . . .	10,325	5,332	8,098	1,630	1,882	27,267
Agra . . .	41,280	37,954	56,571	8,670	8,640	153,115
Oudh . .	32,954	15,646	14,726	2,168	2,409	67,903
Punjab . .	56,844	43,646	62,877	14,184	9,533	187,084
Delhi . .	1,488	1,626	3,492	855	990	8,451
N.-W. F. Province	8,693	6,907	8,558	1,568	1,574	27,300
Burma . .	20,708	14,693	24,720	3,686	5,518	69,325
Central Provinces and Berar.	44,337	30,119	41,623	5,959	5,000	127,038
TOTAL .	809,873	426,812	562,226	85,627	80,081	1,964,619

From this table it will be seen that more than nine-tenths of the suits instituted were of a value of Rs. 500 and less, and that 1,884,538 suits out of 1,964,619 were of a value of Rs. 1,000 and less. The number of suits of a value over Rs. 1,000 represents about one twenty-fifth of the total number. Suits for money and movables (roughly speaking) below a certain value are tried under the small cause court procedure by the officers who possess powers under the Small Cause Courts Acts, and all other suits below the value of one thousand rupees are ordinarily tried, over the greater part of India, by judges of the lowest jurisdiction. These judges are called " Munsifs " in most of the provinces of India. Munsifs

have in some places jurisdiction to try suits over the value of one thousand rupees. In the Presidency of Madras all munsifs have powers up to three thousand rupees, and in other parts of India certain selected munsifs have special powers, which range from as high as four thousand rupees in Bihar and Orissa to two thousand rupees in other provinces. But for the discussion of the present matter the existence of munsifs having jurisdiction empowering them to try suits of a value of more than one thousand rupees may be disregarded.

18. The duties of these officers are more responsible than those of County Court judges in England. The following tables show the number of regular suits decided by small cause court judges (other than judges of the Presidency courts) and munsifs in Bengal in 1922:—

Number of regular suits decided in 1922 under the ordinary procedure by munsifs in Bengal with figures of contest.

1	2	3	4
Total number of decisions.	Number of contested decisions.	Number of uncontested decisions.	Percentage of contest (percentage of col. 2 to col. 1.)
457,366	54,436	402,930	11·90

Number of regular suits decided in 1922 under the provincial Small Cause Courts procedure by provincial Small Cause Courts, Subordinate Judges, and Munsifs in Bengal with figures of contest.

Name of Court.	1	2	3	4
	Total number of decisions.	Number of contested decisions.	Number of uncontested decisions.	Percentage of contest (percentage of col. 2 to col. 1).
Provincial Small Cause Courts.	11,315	1,249	10,066	11·03
Subordinate Judges, Bengal .	7,787	1,090	6,697	14·01
Munsifs, Bengal . . .	146,324	12,909	133,415	8·8
TOTAL .	165,426	15,248	150,178	9·21

Practically one-third of the regular civil suits in India are instituted in this province, and we have been able to obtain full information as to the work there. In Bengal the number of munsifs

possessing powers over one thousand rupees is negligible. It will be seen that officers with small cause court powers in Bengal—for the most part munsifs—decided in 1922, 165,426 suits under the Provincial Small Cause Courts Act out of which 15,248 (or less than one-tenth) were contested. This does not include suits decided by the Presidency Small Cause Court. The munsifs decided in addition, under their ordinary powers, 457,366 regular suits of which 54,436 (or about one in eight) were contested. They disposed of 402,930 uncontested regular suits, and 133,415 uncontested small cause court suits—total 536,345 uncontested suits. Over half a million disposals (that is to say more than a quarter of the total disposals of the whole of India) were thus disposals of uncontested suits of under one thousand rupees in value by munsifs in Bengal alone. The number of suits (excluding suits tried under the small cause court procedure) decided by superior courts in Bengal including the High Court was 10,935.

19. Expedition in effecting decision of uncontested suits will be greatly increased, if their decision is retained in the hands of officers whose main duties are to dispose of them. It would be difficult to improve on the methods by which English County Courts meet their needs. At every important centre there is a County Court registrar who receives plaints, initiates proceedings, and decides uncontested matters. Only those actions, in which the parties are in contest, are determined by the judges. They are determined either at the places where the actions have been instituted or at some convenient adjacent place. By the use of the circuit system the parties are usually relieved from the necessity of proceeding to any great distance from their own homes. Under the English system it has been found possible to provide for the needs of the public of England and Wales in the matter of petty litigation by the establishment of 461 courts, with 434 registrars, 53 circuits and only 54 judges. In 1922, 695,417 actions were disposed of by the registrars and 38,438 (a little over one-twentieth of the whole) were disposed of by the judges. The number of actions undisposed of at the end of the year was 66,081.

20. The system in India is remarkably different. The rule almost invariably is to give a territorial jurisdiction to each munsif whose separate office receives all plaints of the suits instituted within that area. He decides all suits of whatever nature they may be, which are within his jurisdiction and have arisen within that territory. He combines the duties of a County Court registrar with the duties of a presiding judge. He disposes of all suits, uncontested or contested. His jurisdiction is mainly in respect of suits for money relief, the price of goods sold and delivered, suits on negotiable instruments, suits for damages, suits under the local Rent Acts in certain places, suits for immovable property based on title or succession under the personal law or otherwise, suits for specific relief, suits on mortgages and other suits of descriptions too numerous to mention. In addition, he has to manage his office, control his clerks and menials, keep accounts, and conduct a certain

amount of correspondence. He is responsible for the examination of plaints and pleadings and for the arrangement of his own cause list. He has many other duties. His judicial work is performed on the Bench. His other duties are performed in his office or at his private residence. He has to write judgments which in contested regular suits are lengthy and elaborate. These have generally to be written at his residence either early in the morning before he comes to court, or late at night after his return. He utilizes his Sundays and holidays largely for the purpose of writing these judgments. In the circumstances, unless he is a man of very methodical habits there is certain to be avoidable waste of time owing to duties overlapping. The only relief at present given to these deserving officers is by the transfer of suits when the cause list becomes unmanageable. The relief so afforded is appreciable, but the method does not make for expedition. The principle that the jurisdiction must be territorial is so strictly enforced in Bengal that, even where there is more than one munsif in the same sub-division, the jurisdiction of each is confined to a special area within the sub-division.

21. The result in respect of the uncontested work is what might be expected. The munsif, overworked as he is, is inclined to leave the fixing of dates for hearing to his clerks. He does not know, until the case is called on, whether it will be contested or uncontested. An inordinately long list of cases is fixed for each day. It happens too often that a suit which should be decided *ex parte* on the first date on which it is called is crowded out by other work and never reached. The hearing is then adjourned by the clerk, and on the adjourned date the same thing happens. We have come across instances where an uncontested suit has been adjourned nine times and decided on the tenth occasion, nine months after institution. In Bengal, a portion of Assam, and Bihar proper, the situation is further complicated by the inclusion of suits under the Bengal Tenancy Act as one of the staple duties of the munsif. In 1922 out of 604,406, the total number of suits instituted in the courts of Bengal, no less than 329,446 suits were under the local Rent Act. More than 328,000 of these were instituted in the munsifs' courts. The High Court with the desire of affording to landlords of agricultural land and their tenants a speedy disposal of suits under the Bengal Tenancy Act has laid down rules that these suits should take precedence over all others and that they should be decided, if possible, within six months of institution. In consequence the time of the munsifs' courts is occupied from about the beginning of May till October in disposing of these rent suits alone. The disposal of everything else suffers. If it be possible to speed up the decision only of uncontested rent suits in Bengal an enormous benefit will accrue to the litigants.

22. In no part of India is it feasible to recommend the introduction of the English County Court system in its entirety. The circuit system for disposal of civil matters does not work well in those places in India where it has been tried. But where, as in Bengal, there are a sufficient number of judges of the same class

in one place, something akin to the English system can be introduced with great advantage either by the creation of a class of officers possessing the powers of an English County Court registrar, or by the division of duties amongst the existing members of the judicial staff, or by utilizing both methods. In some important headquarters of the district judgeships and in many outlying sub-divisions in Bengal it is possible to appoint with advantage a registrar of subordinate judges' courts or munsifs' courts (or both combined) responsible for receiving, checking and admitting plaints, issuing summonses, fixing dates of hearing, supervising the work of process-servers, and deciding uncontested suits on confession of judgment, compromise, or *ex parte*. It would be necessary to introduce the form of summons already suggested, if a registrar is appointed. In addition such an officer can relieve the judges of certain office work and the like, supervise the copying department and perform other duties similar to the duties performed by the registrars in the High Courts. These duties are at present performed by the presiding officers themselves.

23. Formerly, the tendency was for separation in every branch of judicial work. Of late years there has been amalgamation to some extent. At present, at headquarters, nearly everywhere in India, there are central offices for process serving and accounts, which do the business of courts at headquarters, and at certain places there is a central copying department which arranges for the provision of copies of documents of all courts. Where the new system has been introduced the result has been invariably greater expedition and less expenditure. We consider, also, that, wherever possible, the work of receiving and checking plaints and issuing summonses should be done in one office for all courts (or at any rate all courts of the same class) situated in the same place, and that, even if a registrar be not appointed, one officer should be selected to take up all the cases, arising in that locality, for the same class of courts, and should dispose of all the uncontested work, passing on a portion of the contested work to other courts and retaining the remainder in his own court.

24. A considerable improvement in dealing with uncontested work, in cases in which an officer is entrusted with the disposal of both uncontested and contested suits, will take place if the officer follows these simple rules:—

He should fix a time, about half an hour after his arrival in court, when he should go through the whole list of the day, disposing of all uncontested work at once, and putting the contested work on one side for disposal after uncontested work has been completed. Endeavours should be made never to adjourn an uncontested suit to a date on which contested work is fixed. We have found instances in certain provinces, where such a system has been employed on the initiative of the presiding officers themselves, and where this has been done, there has been a marked improvement in disposals.

APPENDIX TO CHAPTER 1.

Ex parte decrees.

Throughout India the practice is general—indeed we understand it to be uniform—of requiring a plaintiff to adduce evidence of the truth of his claim notwithstanding that the defendant, although served with a summons to appear and answer, does not appear to contest the claim. This is doubtless a correct practice in the absence of any rule or other express provision to the contrary. The Calcutta High Court in 1871 affirmed the necessity of this practice (*cf.*, 15, W. R., 504) and has repeated this opinion in more recent times. "Every judge in dealing with an *ex parte* case should take good care to see that the plaintiff's case is at least *primâ facie* proved."

By sections 96 and 100 of the Code an original or appellate decree may be subject to appeal notwithstanding that it was passed *ex parte*.

Leaving on one side the special provisions of Order 37, the forms of summons known to the Code—whether for settlement of issues or for final disposal—require the defendant to be present in person or by proxy in open court on the day of hearing. If he is not present, the case is or may be dealt with in his absence by the presiding judge.

2. By special rules applicable to some High Courts and Presidency Small Cause Courts defendants are required either in all cases or in some cases to "appear" in a different manner—that is, to "enter an appearance" by lodging a memorandum of appearance in the court's office. This in some cases has to be accompanied by a written statement of the defence. Even so, however, and notwithstanding that every plaint has in India to be verified, judgment is not given in the absence of evidence. Thus, in the Calcutta High Court a case is in default of appearance set down for hearing in the undefended list. In the Calcutta Small Cause Court there are rules which authorise what is called a default summons in suits for damages or for liquidated demands. This is used only, as we understand, for cases where the claim exceeds Rs. 50. The defendant is warned that if he does not duly enter an appearance in the office a decree may be recorded against him by the registrar. In practice, however, the registrar hears evidence and marks and files any documents tendered in support of the claim. For cases below Rs. 50 the ordinary form of summons for final disposal is employed—that is, the defendant is required to appear before the judge in court.

3. In England the rules of the Supreme Court distinguish between claims, *e.g.*, liquidated claims which can be specially indorsed on the writ of summons and other claims, *e.g.*, for damages which can only be the subject of a general indorsement. In the case of a liquidated demand, whether the writ be indorsed specially or otherwise the plaintiff can in default of appearance

enter final judgment in the office straight away for any sum not exceeding the sum indorsed on the writ. In the latter case he can only sign an interlocutory judgment for damages to be assessed, *e.g.*, before a Master or before the under-sheriff and a jury (*cf.*, R. S. C. O. 13, Rs. 3 and 4).

In the English County Courts there is a similar distinction between cases in which a plaintiff may take out a default summons and cases in which he may not. In the former case unless the defendant gives notice to the court by post or otherwise in writing of his intention to defend, the registrar may give the plaintiff judgment without any further proof of the claim. A "Default Summons" has thus a specific meaning. It can be used only for a debt or liquidated money demand [*cf.*, County Courts Act, 1888, S. 86 (*1*)].

4. There is no difficulty from the stand point of legal principle in giving judgment by default once the court is satisfied with the proof of service of the summons or writ on the defendant. His absence until otherwise explained is very good proof indeed that he has no answer to the claim. It is almost, though not quite, as good as a confession of the claim. It is much more than mere *primâ facie* proof. We venture to point this out because certain witnesses before us appeared to be under the impression that to give a decree "without evidence" was something inherently indefensible.

5. For the purpose of reducing, as far as may be, the work to be done by the judge himself in open court, for the purpose also of avoiding all unnecessary work and all unnecessary expense to plaintiffs, it would seem desirable to separate in advance not only (*a*) contested and uncontested cases, but also (*b*) those uncontested cases which involve the hearing of evidence from those which do not. High Courts have to be considered here: also Presidency Small Cause Courts. If a registrar system such as is above suggested can be introduced into some of our mofussil courts, there too the question will become specially important. The question is whether Indian conditions really make the "decree by default" in the strict sense inadvisable.

6. It would seem to be as true of the Indian litigant as of any other that he will not permit a false claim to be decreed against him if he has had knowledge of the proceedings and if he has not been prevented from coming to court to object. There is perhaps in India a special factor in that a defendant with a good case is more exposed to the suppression of process and more liable to fail to get to court in time. The real safeguard against these risks, however, is a right to set aside the decree.

7. It would appear that the main intention in directing that evidence should be recorded before an *ex parte* decree is passed is to provide a safeguard for the absent defendant, but in practice the recording of such evidence does not in our opinion provide any safeguard worth the name. A court is not likely in an ordinary

case to be in a better position to ascertain the truth or falsity of a claim by examining the plaintiff himself and his witnesses if any. If a plaintiff is sufficiently dishonest to bring a false claim he will not, as a rule, be averse to coming forward to swear to its truth, and it is unfortunately a matter of experience that a dishonest man, who is ready to bring a false claim, has no difficulty whatever in procuring dishonest witnesses to support it. The plaintiff runs no appreciable additional risk by swearing to a false claim. Under the provisions of Order VI he has to verify his case, and he is exposed to a criminal prosecution, if he files a false suit knowing it to be false or if he makes a verification untrue to his knowledge. He does not increase his risk appreciably by coming into the witness box in an *ex parte* proceeding and swearing falsely to the truth of his plaint. In respect of the false witnesses who support his claim, it is a matter of common knowledge that it is by no means easy to trace such witnesses after the *ex parte* proceedings have been decided, or, even when it is possible to trace them, to bring them to account in a criminal prosecution.

8. We consider, however, that no decree by default should in any case be passed unless by a special form of summons the defendant is given warning to that effect. Secondly, that they should be confined to suits in which the claim is solely for a liquidated sum of money (and possibly—in Presidency Towns—for ejectment). Thirdly, that in addition to a right to have the decree set aside on the usual grounds (O. IX, r. 13), the court should have a discretion to set it aside in any case provided that there appears to be *primâ facie* evidence of a *bonâ fide* defence and that security for the claim be given unless the court should see fit for special reason to dispense with security. Fourthly, that in any case the court should have the right to require oral evidence in support of the claim if for any reason it thinks fit. Fifthly, it might be provided by rule that on all default decrees interim interest should be given at 6 per cent. and that, at a like rate, interest should run on the decretal amount after the date of the decree.

9. On these lines we consider that the decree by default might safely be introduced into our practice. Even in ordinary provincial small cause courts its use would, we think, save some time and avoid some expense to plaintiffs. Where defendants can be required to give notice of appearance in the office of the court and where there is a registrar or some corresponding officer it may well be possible to allow the plaintiff to "sign judgment" in the office as is done in England. In any event the plaintiff or his pleader might well be allowed to draw up the decree and get it passed and sealed by the court.

10. Any scheme for allowing plaintiffs in suits for damages to sign interlocutory judgment in default of appearance and for remitting the question of the amount of damages to a subordinate judicial officer ought in our opinion to be confined to the Original Side of High Courts. No such arrangement is likely to work with expedition in the mofussil.

CHAPTER 2.

Contested suits before the Civil Courts. State of different provinces as regards amount of work and extent of delay. Some general causes of delay.

1. Contested suits will now be considered. It is in their trial that the most serious instances of avoidable delay occur. As has been seen from the figures already given, contested suits are from one-fourth to one-fifth of the total number. Allowing for the fact that many suits in which there has been contest at some stage are returned as uncontested, the figure may be roughly put at about half a million for the whole of India. The fact that a suit is classified as contested, does not signify much in itself. Unless a claim is admitted and judgment confessed, or a suit withdrawn, compromised, or decided *ex parte*, it is called a contested suit. And further, a suit is classified in some places as contested, if there has been contest at any stage.

2. The contest is often trivial. It may only be as to the rate of interest, or there may be a plea for payment in instalments. It is in the minority of suits that the contest is severe. But there remains that residue. Here proceedings at the best are not as expeditious as they should be, and at the worst they are dilatory to a degree.

3. Before considering such causes of delay as arise during the handling of the suit by the presiding officer, it is necessary to examine the figures of contested suits in order to ascertain the position of the various provinces in respect of their disposal. What is required is an approximately correct idea as to the situation in respect of the disposal of contested suits of value involving a reasonable amount of difficulty. It is possible to arrive at a reasonably correct estimate, but it is not possible to arrive at exact results on the materials before us. In some places we can ascertain with certainty the courts in which such suits are instituted. In other places we have not been able to obtain exact figures even on that point. We have endeavoured in the course of our tour to obtain particulars to supplement the figures given in the annual returns, but have not always been able to obtain them. Where we have obtained them, we have used them.

4. To secure a criterion as to serious delays it is necessary to take a determining factor. We consider that the best determining factor is the figure of regular suits pending for more than one year. It may be postulated, with some confidence, that a suit pending for over a year is a contested suit. The exceptions are likely to be negligible. It may further be postulated that such a contested suit will not be disposed of more rapidly than previous contested suits were decided in the same class of courts in 1922. Further, it may be laid down that, where the figure of pending suits of over one year amounts to more than one half of the decisions in 1922 of contested suits in the courts of the same jurisdic-

tion, the arrears have become unmanageable. We have not, however, been able to discover everywhere what are the numbers of suits pending over a year. Where this information has been obtained, it is given in the annexed table, with the exception of the figures in Sind.

5. Sind is a peculiar province. The mass of original work there is done in Karachi in the Judicial Commissioner's Court. There are only three judgeships outside Karachi, and the work in them is very light. The work in the Judicial Commissioner's Court is considered in another chapter. Outside the Judicial Commissioner's Court the subordinate judges in the three judgeships decided, in 1922, 253 suits, only 45 of which were contested, and 107 suits more than a year old were undisposed of at the close of the year.

6. The first object we are endeavouring to attain is to ascertain the relative positions of the more important provinces in respect of seriousness of delays in the disposal of all contested regular suits, excluding suits decided under the small cause court procedure. To obtain a broad result the figures are confined here to the number of decisions of such suits in 1922 by subordinate judges and munsifs. The figures for courts superior to the courts of district judges will be considered elsewhere, and the figures of the district judges' courts are not sufficiently important to justify inclusion in this table. It is possible to classify the work done by subordinate judges and munsifs separately in Bengal, Assam and Madras. This classification will be given later. In Bombay it is not possible to separate the work as between the higher and the lower courts, as senior subordinate judges (there are no munsifs in Bombay) not only decide the more important class of suits but also many of the less important. A similar classification can be made in Bihar and Orissa, and Agra and Oudh, but it is not necessary to make it, as the situation in those provinces is not serious.

The result, as will be seen from the table, is to show that the situation is serious in Bengal, Assam, Madras, Bombay and Sind and is not serious in the remaining provinces.

Province.	1	2	3	4
	Number of decisions.	Number of contested decisions.	Number of suits pending over a year.	Percentage of 3 to 2.
	Class I.			
Bengal	464,184	56,373	16,052	28·45
Assam	22,099	3,587	903	25·17
Madras	122,007	64,745	14,069	21·88
Bombay	59,574	28,833	5,682	19·70
Sind	*See* Text.			

Provinces.	1	2	3	4
	Number of decisions.	Number of contested decisions.	Number of suits pending over a year.	Percentage of 3 to 2.
	Class II.			
Bihar and Orissa	136,066	25,207	986	3·91
Punjab	*See* Text.			
Central Provinces			755	
Agra	86,466	26,232	703*	2·67
Oudh	21,357	8,937	Not available.	
Burma		*See* Text.		
North-West Frontier Province		*See* Text.		

* On 30th September 1923.

The provinces except Sind have been arranged in order of the seriousness of the situation, those with the worst arrears being placed first. Sind, as already noticed, stands by itself.

7. The reason why no figures are given for the Punjab, the Central Provinces, Burma and the North-West Frontier Province is that on the figures we have been able to obtain we cannot separate the decisions of suits tried under the small cause court procedure from the decisions of other suits in those provinces. We have not been able to obtain the number of suits pending for more than a year in the Punjab, Oudh, Burma and the North-West Frontier Province. The following table, however, shows how it is possible to apply a criterion to the provinces in question. It gives decisions of all suits tried in the provinces including small cause court suits.

Province.	Total decisions.	Total contested.	Pending.	Pending over three months.
Punjab	190,187	54,920	57,811	19,340
Central Provinces	125,056	27,318	32,107	7,367
Agra	160,894	39,259	27,565	8,636
Oudh	70,689	17,863	11,291	2,402
Burma	68,832	17,113	8,607	Not given.
North-West Frontier Province	27,591	12,536	4,432	457

8. This table shows suits pending for over three months in all the provinces entered except Burma. It will be seen that in the Punjab 54,920 contested suits were decided and 19,340 were pending for over three months. In Bihar and Orissa 25,207 contested suits were decided and the number of suits pending over three months was 22,400. This would show the work in Bihar and

Orissa not as good as in the Punjab. The Punjab is, however, clearly not as good as the Central Provinces on comparison of the suits pending over three months. Agra shows better than the Central Provinces as it turned out more contested cases and showed a smaller number of suits pending over a year. Oudh appears to be better than Agra on comparison of the proportionate number of suits pending over three months. The figures in Burma and the North-West Frontier Province speak for themselves.

9. A rough idea of the relative situations has thus been obtained, and something has been done to eliminate the less important suits by the exclusion, wherever possible, of suits decided under the small cause court procedure. A further step will be made towards an estimate of the time taken in deciding the more important suits by separating the work of the subordinate judges and munsifs in Bengal and Madras. The figures are given in the following table:—

Number of regular suits excluding suits decided under small cause court procedure, decided by subordinate judges and Munsifs in Bengal and Madras in 1922.

Court.	1	2	3	4	5
	Number of decisions.	Number of contested decisions.	Percentage of 2 to 1.	Undecided at end of year.	Pending for more than a year.
BENGAL.					
Subordinate Judges . .	6,818	1,837	26·92	8,346	3,160
Munsifs	457,366	54,436	11·90	134,310	12,892
MADRAS.					
Subordinate Judges . .	3,927	3,056	77·82	4,264	2,057
Munsifs	118,080	61,689	52·24	52,881	12,012

10. These provinces have a total population of about eighty-nine millions. More than half the suits instituted in India are instituted in them. The other provinces with a population of about one hundred and fifty-six millions provide the remainder. The progress of litigation in contested suits in these two provinces indicates the position of an important number of Indian litigants.

11. The figures approach the unmanageable in the munsifs' courts in Bengal and Madras. In 1922 there were in the munsifs' courts, 12,892 suits pending for more than a year in Bengal and 12,012 in Madras. The position is serious enough. It is not

a matter for congratulation that no less than 24,904 suits in these provinces alone were undecided in the munsifs' courts after a year. Although the arrears do not represent at the worst as much as one-quarter of the disposals of the contested suits of the same year, it is hardly possible to hope, whatever be the improvement in the working of the courts, that the figures will be reduced in the near future to something reasonable without increase of staff.

12. In the case of courts of subordinate judges in Bengal, Madras and Bombay it is difficult to see how the problem can be solved by any improvement in methods alone. The figures stand as follows:—

Subordinate Judges' Courts.

	Contested cases decided in 1922.	Cases pending for more than a year in 1922.
Bengal	1,837	3,160
Madras	3,056	2,057

The situation in Bombay approaches that in Madras, but cannot be illustrated by similar figures. In Bengal the pending file of such suits undecided after a year represented 166·57 per cent. and in Madras 67·13 per cent. of the decided contested suits of the year. These figures are not even as good as they appear at first sight. The report containing statistics of the civil courts of Madras Presidency gives the figures showing the pendency of suits according to the year of institution. These are they.

Court	Number of suits pending at close of 1922 with years of institution.																		
	1904.	1905.	1906.	1907.	1908.	1909.	1910.	1911.	1912.	1913.	1914.	1915.	1916.	1917.	1918.	1919.	1920.	1921.	1922.
District Courts	..	..	..	..	..	..	1	..	1	..	..	2	3	5	9	9	32	141	422
Sub-Judges Courts . . .	..	..	..	..	2	1	3	2	3	5	5	17	23	51	83	226	526	1,173	2,039
Munsifs' Courts . . .	1	..	..	..	..	..	..	..	14	3	20	12	28	113	235	633	2,658	8,558	40,284
TOTAL .	1	..	..	..	2	1	4	2	18	8	25	31	54	169	327	868	3,216	9,872	42,745

We have not been able to procure similar figures from other provinces. From the Madras figures it will be seen that the percentage is inclined to show conditions better than they are. It would not appear, at first sight, from the percentage of 67·13 that the file was so congested as it is, and that suits instituted so many years before were still undecided. Further, light contested suits are too often decided at the expense of more difficult suits of older standing.

13. An examination has been made of the records of a large number of decided and undecided suits throughout India. We have arrived at the conclusion that in Bengal parties are not likely to obtain a decision in a contested suit of value involving a reasonable amount of difficulty in less than two and a half years. In Bombay and Sind and in Madras the period would be about two years, and in Bihar and Orissa, Agra and Oudh, the Punjab and the Central Provinces it would be about one year or a little less. In Burma and the North-West Frontier Province the period would be even shorter.

14. In Bengal and Assam, Bombay and Sind, and Madras the arrears in this class of suit are either unmanageable or approach the unmanageable. It is true that these suits represent a small proportion of the total number, but it may be estimated safely that the interests of more than one hundred thousand persons are involved in them, and their decision occupies the major part of the time of several hundred courts.

15. Improvement in methods is of vital importance. We can suggest improvements, but we are convinced that, where the arrears are unmanageable, improvement in methods can only palliate. It cannot cure. It is patent that, when a court has pending work which will occupy it for something between one year and two years or even more, new-comers have faint hopes. When there is enough work pending at the end of 1924 to occupy a subordinate judge till the end of 1926, difficult contested suits instituted in 1925 have no chance of being decided before 1927. Whatever be the improvement in methods, improvement in methods alone cannot be expected in such circumstances to produce a satisfactory result even in a decade.

16. Until this burden is removed or appreciably lightened, the prospect is gloomy. The existence of such arrears presents further a serious obstacle to improvement in methods. It may well be asked—Is there much tangible advantage gained by effecting an improvement in process serving, pleadings, handling of issues and expediting to the stage when parties are in a position to call their evidence, when it is a certainty that, as soon as that stage is reached, the hearing must be adjourned to a date eighteen months ahead or later, to take its place, in its turn, for evidence, arguments and decision? Unless a court can start with a reasonably clean slate, improvement of methods is likely to tantalise only. The existence of a mass of arrears takes the heart out of a presiding officer. He can hardly be expected to take a strong interest

in preliminaries, when he knows that the hearing of the evidence and the decision will not be by him but by his successor after his transfer. So long as such arrears exist, there is a temptation, to which many presiding officers succumb, to hold back the heavier contested suits and devote attention to the lighter ones. The out-turn of decisions in contested suits is thus maintained somewhere near the figure of the institutions, while the really difficult work is pushed further into the back-ground.

17. Supervision over details has tended in the past to be relaxed owing to the fact that no real result was effected. It could not have been of much consequence in many courts, in 1922, whether the parties were brought before the tribunal in a fortnight or three months, whether the written statement was filed in a month or six months, whether the issues were framed on the first date fixed for the purpose or several months afterwards, as these courts knew from the commencement that evidence could not be heard till 1924.

18. Further, delay begets delay. Once the hearing of a suit has proceeded beyond a certain point, there is always an increased risk of the death of a party, causing the accrual of further delay in appointing his representatives. If the hearing had been accelerated, the death would have occurred after decision and not before. Should it happen that one judge has framed the issues, a second heard a portion of the evidence, and a third heard the remainder of the evidence and delivered the judgment, much extra time must necessarily have been devoted by the third judge to mastering the facts. In addition his conclusions will be less valuable. So here the element of inefficiency is super-added.

19. Conditions during recent years have grown steadily worse not only owing to the increase in the institution of suits, but owing to the fact that the time available for their disposal has been reduced by increase of work under other heads. Formerly it was possible to work on a system which allowed to each district or to two or more districts one district and sessions judge, a subordinate judge in each district with an occasional additional subordinate judge, and one or more munsifs. In some districts the services of one subordinate judge and one munsif only were required. District and sessions judges formerly decided practically all cases committed to sessions, and heard all criminal appeals and revisions. This was the work on the criminal side. On the civil side they decided certain original civil suits, applications under Probate and Succession Acts, and miscellaneous civil matters. They heard appeals from subordinate judges' decrees up to the value of Rs. 5,000 and most of the appeals from munsifs. They further exercised supervision over all subordinate courts. Subordinate judges and munsifs decided suits of the first instance, and in most parts of India did little else.

20. The various duties have changed and increased greatly of late years, and the staff has not increased in proportion. The criminal work even where the number of cases has not increased now takes up a greater portion of the time of the district and ses-

sions judge. The introduction of the jury system has necessitated the devotion of nearly double the time to the hearing and decision of the same number of cases. Cases when tried by a judge and a jury take much longer to decide, than when they are determined with the aid of assessors. In addition, the actual number of sessions trials is higher than in the past. The recent amendments in the Criminal Procedure Code have increased considerably the duties of sessions judges. Criminal appeals and revisions are more numerous, and take longer to decide. Further duties, as for example the determination of election petitions, have been added, and judges are deputed more frequently to outside duties. It is not always that relief is given in the case of deputation. Very frequently when relief is given, there is delay in supplying it. Even when relief is given promptly, there must be some dislocation in the work.

21. Office work has increased and takes up much more of the time of district judges, subordinate judges and munsifs than it did in the past. The increasing labour involved in connection with accounts is not appreciated sufficiently. It would take a chapter to detail what are a judge's duties in connection with account keeping, but some idea may be given from the instructions laid down by the High Court of Patna for the guidance of the judges. Each judicial officer in charge has to check daily ten registers which are kept separately for each court. He has further to compare entries in the cashier's general cash book with the treasury receipts and compare entries in the treasury pass book with entries in the cash book. He has to compare the treasury advice with the treasury receipts and entries in the registers of payment orders, of deposit receipts, and miscellaneous receipts and to compare the treasury advice with the entries in the treasury pass book. He has also to compare the daily statements with the entries in the registers. The district judge has to supervise the accounts of all the courts below him. He has to do this daily. He further has to make a monthly examination, which is of the nature of an audit.

22. The time devoted to this sort of duty varies throughout India from half an hour to one and a half hours a day according to the volume of the transactions. In some provinces the district judge's duties in this respect are delegated to the senior subordinate judge at headquarters, but this delegation only results in the subordinate judge having less time to devote to his judicial duties, to give the district judge more. There are many districts, in which the district judge has to devote nearly two hours a day to his office work (including account work) and the subordinate judges and munsifs have to devote at least an hour or more. Some officers obtain this time by commencing before court hours and finishing afterwards, but it is impossible to order officers to work overtime for the purpose.

23. Some district judges are asked to perform duties which do not pertain to judicial officers. In the United Provinces district judges are district registrars under the Registration Act. In other provinces this work is done by other officers. There is nothing of

a judicial nature in the real sense of the word in the performance of the duties of district registrars, and where these are added to the duties of the judge, the time for disposal of his judicial work is reduced.

24. In Bombay, where there are a large number of minors' estates under administration, the district judge is expected to control the management in all particulars. It is the judge's duty to protect the welfare of a minor, but it is not considered his duty anywhere, except in some parts of India, to check details as to the minor's domestic expenditure, his clothes, food, and school bills, to examine realizations of income, pay of servants and the like and combine the work of an estate manager, a guardian of the person, and a professional auditor.

25. In the past a district judge's work was mainly judicial. He had some administrative work but not a great deal, and had ample time for its disposal without detriment to his judicial duties. In the course of years his work has become more and more administrative, and when the separation of judicial and executive functions is accomplished, the district judge will be as much an administrator as a judge. When this step has been taken, he will be in immediate administrative charge of all the criminal courts as well as all the civil. The effect of this upon his civil work will be so serious as to involve a reconsideration of the whole question of his civil powers.

26. The judge's miscellaneous and administrative work has increased to such an extent that it has become more and more the practice for him to hand over appeals from munsifs (or lower grade subordinate judges as they are called in some provinces) for disposal to the senior subordinate judges. This table shows how appellate work was distributed in 1922 between district judges and subordinate judges.

Distribution of appellate work between district and subordinate judges in 1922.

Province.	Number of regular civil appeals decided by district and additional judges.	Number of regular civil appeals decided by subordinate judges.
Bengal	9,834	9,697
Assam	751	232
Bihar and Orissa	3,657	4,794
Madras	4,956	5,987
Coorg	5	26
Bombay	3,656	631
Sind	232	..
Agra	4,733	4,293
Oudh	647	1,044
Punjab	8,225	3,053
North-West Frontier Province	895	430
Burma	561	3,323
Central Provinces	3,788	..
TOTAL	41,940	33,510

It will be seen that now subordinate judges in Bengal and Agra do nearly one half of the total appeals and that in Bihar, Madras, Oudh and Burma they do more. This means that they have less time to devote to the trial of original suits. Formerly subordinate judges did very little appellate work. Now they do a great deal. In addition, the work of subordinate judges has been increased in many provinces by their having been given powers to hear criminal cases. There are undoubted advantages in delegating to subordinate judges some criminal work. They should be practised while subordinate judges in the disposal of criminal work, in order to fit them for promotion to district judgeships, but this delegation gives them even less time for the disposal of their original civil suits which is their main work.

27. Under the Land Acquisition Act it is laid down that all disputes should ordinarily be decided by the district judge himself. In Bombay and Sind the district judge only is permitted to try suits to which the Secretary of State is a party. The amount of work under such heads has increased very considerably in recent years. This reservation results either in such work being held up for an unconscionable period or the district judge neglecting his other duties. Some attempt has been made in places to delegate to other courts, but no sufficient effort has yet been made in this direction.

28. To conclude, in the course of years the amount of regular civil and criminal work has increased considerably. Conditions have further changed, and such work takes longer to dispose of than it formerly did. The amount of miscellaneous and office work has also increased. The result has been that judicial officers have less time at their disposal within which to do regular civil work. The failure of the old system to respond to new conditions has been mainly responsible for the creation of the present arrears.

CHAPTER 3.

Causes of delay during the trial of contested suits. Unintelligent fixing of dates for hearing. Written statements. Pleadings. Filing documentary evidence. Discovery. Inspection. Issues.

1. The causes of delay during the trial of contested suits will next receive attention.

Fixing of dates.

2. The peculiar manner in which the dates of hearing of suits is fixed over the greater part of India is one of the major factors in producing delay. The practice is almost everywhere to fix considerably more work than can possibly be got through in the day allotted for its disposal. All courts prepare something of the nature of a cause list, and in this list is put down the work fixed for a particular day. Over the greater part of India the entries in this cause list are made by a ministerial officer and not by the presiding officer of the court.

The object to be attained should be the completion of the work fixed for a certain day on that day. It is, of course, not possible to attain this object invariably. A reasonable estimate can be framed as to how long a particular suit will take to hear. The time required for the purpose may exceed the estimate; it may be below the estimate. The death of a party may prevent the suit being heard on the day on which it is fixed, the plaintiff may withdraw the suit, the parties may compromise. If the suit comes on for hearing, the hearing may take a longer period than the period estimated by the presiding officer. But over the greater part of India no attempt is made to make such estimates, and more work is fixed in a day than can possibly be done in the day.

We are convinced that it is possible to make some sort of estimate as to the period required for the disposal of each particular portion of the work, and to fix the dates after making such an estimate, so as to ensure almost invariably that the work fixed for a particular day will be done within the day. A margin may be allowed, but every endeavour should be made to prevent litigants appearing in court and being sent away without a hearing, because the time of the court is so occupied that no attention can be paid to them.

It is even worse, when these litigants have brought witnesses with them, and the witnesses are kept in attendance for the greater part of the day and then sent back to their homes unheard. In many courts, owing to defective arrangements, parties appear over and over again without obtaining a hearing, and witnesses are brought back on several occasions before their evidence is recorded.

In some places attempts have been made to arrange the work in a reasonable manner. Where we have discovered such instances we have been pleased to note that the public convenience has been greatly assisted, and the work has been disposed of within a reasonable time.

3. It is obviously not easy to maintain a satisfactory cause list and not to disappoint the litigants, where the volume of work is very great. The difficulty will be reduced appreciably, if the uncontested work is separated from the contested and handed over to a different officer, in the manner previously suggested. But, while it is not so easy to prepare an intelligent cause list in courts of munsifs where the amount of work is considerable, it is not impossible to prepare such a list. The difficulties of preparation are greatly exaggerated everywhere.

In courts where the number of cases is not considerable, the difficulties are trifling. There are many subordinate judges' courts in which not more than fifty contested regular suits are decided within a year. In such courts it should be possible to make reasonably accurate estimates and not to disappoint litigants except very rarely.

The question seldom receives the attention which it deserves. In some places the preparation of the list is almost scandalous. We have come across instances in which four times or five times the amount of work which could possibly be disposed of under the most favourable conditions, had been fixed for one day and in which four-fifths of the parties sent for must necessarily have returned disappointed.

And the process continues. It does not always happen that a case which has not been heard on the first day will be heard on the adjourned date. The question of delay here is of importance, but the evil of the extra expense and inconvenience caused to the public is of more importance.

4. It is true that if a court is not likely to have time to hear evidence in a case in which issues have been fixed in January 1925 till January 1926, whatever may happen, the evidence will not be heard before that date, if the first adjourned date is January 1926 or adjourned dates are fixed (as they usually are) in February, March, April 1925, and every month throughout the year. Nothing is gained by that process by the court. In fact it is put to the inconvenience of writing one useless order after another. Much is lost by the parties.

We are unable to understand how the practice has ever grown up. Higher authorities do not approve the system, and discourage it by their orders. If the presiding officer is afraid of a possible stigma from having in his court a suit pending for more than a year, he will not escape by fixing twelve intermediate dates on which nothing is done, for the case will not be decided within the year.

Certain subordinate judges and munsifs frankly admitted to us that it was their practice to fix more work than they could

complete, and they stated that it was necessary to do so, because it was always possible that if only sufficient work were fixed for the day a portion might disappear, and then the presiding officer would be left without full occupation.

The utmost concession that should be made to this view, would be to fix for hearing on one day perhaps one quarter more than could be done on it and to give the undone work precedence on the next date. We have been unable to find in the majority of cases that any such practice has been adopted. More work is fixed for the day than can possibly be got through, whatever drops out, and precedence is not given to the undone work on the next date.

In any circumstances the principle is vicious. It appears to be based upon the idea that the courts may safely ignore the convenience of the public, in order to enable them to show a tale of work, which they suppose will be considered satisfactory by the higher authorities. It must be impressed and impressed very clearly that the first consideration should be the convenience of the public and that all other considerations should give way to that.

It has been found, however, that those courts who fix their dates in a reasonable manner do not find their work thrown out to any great extent by so doing. On the average the work equalises up when reasonable estimates are made. One case takes a little more, another takes a little less time. At the worst, if on one particular day the court is left with insufficient case work to fill up more than an hour or even less, the presiding officer has judgments to write in cases which he has heard, pleadings to examine in cases that are coming on for issues. There is usually much to inspect in his office. He can fill up his time without detriment to the public in this manner.

In all places in which there is more than one court of the same jurisdiction no difficulty will be felt for, if a presiding officer finds that he has not sufficient work for the day, he can send for work from his colleague and take it on his own file.

5. There is a further argument that is raised in support of the practice to which exception is taken. It is this. The upholders of the practice assert that the position of parties who wish to compromise or withdraw is improved by fixing an adjourned date on which it is known that in absence of a compromise or withdrawal the suit will not be taken up. There are some instances in which parties are driven to compromise or withdrawal by their inability to tolerate the manner in which the hearing is dragging on. We have found more than one such instance.

It, however, is a scandal that any litigant should be coerced to a withdrawal in this manner. In cases where the compromise or withdrawal is the result of a genuine settlement, it is perfectly easy for the parties to effect withdrawal from the contest on any day, whether that date has or has not been fixed for hearing. All that is required for the purpose is an application duly certified put in at any hour of the day.

We are forced to the conclusion that the practice has grown up owing to apathy. Presiding officers, merely in order to save themselves trouble, have allowed their clerks to fix dates and have made no estimates. The clerks fix dates without any attempt at method and arrange four times the amount of work that can be got through in the day.

There is no reason why clerks should not perform the clerical duty of writing down the dates, provided these dates are written under the orders of the presiding officer, and provided he controls the work sufficiently. Unfortunately when the presiding officer does not write the order with his own hand, he is very apt not to know what the order is.

6. We came across two instances in which applications were made to set aside *ex parte* decrees. In one instance the date of hearing was fixed nine months afterwards and in the other the hearing was fixed ten months afterwards. It may be surmised that in neither case did the presiding officer know the date which the clerk had fixed, for in both these courts the officer was supposed to keep one day in the week for the hearing of such applications.

The last two instances did not on the face of them indicate anything worse than carelessness. We must, however, emphasise that there is danger of something considerably more objectionable than carelessness if the work is done in this manner. These clerks are under-paid. We make no charge of wholesale dishonesty against the ministerial officers of Indian subordinate courts. The witnesses who made those charges had no materials to support them and we are inclined to believe that such charges are frequently made very recklessly and without sufficient enquiry. It is obvious nevertheless that an under-paid man entrusted with such a duty is exposed to the temptation of obliging those who have made it worth his while by fixing a convenient date, and of showing his disapproval of those who have not made it worth his while by fixing an inconvenient one.

Filing of written statements.

7. We have already considered the course of proceedings up to the date, when the defendant has been ordered to file a written statement. We continue from the date on which the written statement has been ordered to be filed.

It is extraordinary in how many instances the defendant is not ready with his written statement on the date fixed for its production. It is an exception for him to have it prepared on the first date on which he has been ordered to present it. Every sort of excuse is put forward to cover the omission. The real reason why the written statement is not ready is usually that the defendant waits until the last moment to engage his counsel, and after he has engaged him delays giving instructions. The courts are at present inclined to condone these laxities, and to grant as a matter of course further adjournments for the production of the written statement.

In our opinion this should cease. Every defendant should be allowed a reasonable time within which to prepare his written statement. The period so granted will be shorter or longer according to the simplicity or complexity of the dispute, but, if the defendant has been granted a reasonable time for the purpose, he ought to be compelled to file his written statement within the period allowed, and should ordinarily not be granted further time for the purpose. If he can establish genuine cause for his omission, he should be granted one extension. It is difficult to see why he should be granted another.

8. The law, as it stands, makes a defendant liable to a severe penalty, if he does not obey the court's order in this respect. These penal provisions of the Code are, however, practically never enforced by the courts. Order VIII, rule I, directs that a defendant may, and, if so required by the court, shall, at or before the first hearing or within such time as the court may permit, present a written statement of his defence. It is almost unknown in courts other than the High Courts (except perhaps in the Central Provinces) for a defendant to file his written statement before the first hearing. It is hardly ever the case that he files his written statement at the first hearing. In cases of complexity a written statement is usually essential, and courts in order to arrive at an accurate decision are obliged to insist upon its production.

Order VIII, rule 10, lays down that " where any party from whom a written statement is so required fails to present the same within the time fixed by the court, the court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit." The determination of a suit against a defendant because he has failed to file a written statement, when ordered to do so, may appear an extreme course, but it is the course which the law contemplates as desirable in certain instances, and there can be no doubt that if such a course were adopted in extreme cases, few would be likely in any case to disobey an order of the court directing the statement to be filed by a particular date.

Even if the contempt of the court's order be punished only by the award of costs against the offender, much good would be done. At present nothing is done usually.

9. Objections to a stiffening up of the procedure are based upon the arguments that Indian litigants are too ignorant to understand the court's orders, and that any attempt to coerce them would be a great injustice. Those, who advance these arguments, base them usually on an honest conviction that the people are in the mass so little advanced, that latitude must be allowed them in this respect for many years to come. It appears to us, however, that the vast majority of litigants in India understand their own interests. In any circumstances, it can hardly be contended that all the offenders are ignorant persons. Many are men of more than average ability. The same latitude is extended indiscriminately to all.

In the case of a person of normal intelligence it can hardly be possible that he will misapprehend a plain order. In the rare case where the defendant is of intelligence so defective as to be unable to appreciate such an order without explanation, it will be possible to explain its purport to him at the first hearing, and the court, recognizing that his mental defects afford sufficient cause for a concession, can reasonably grant him one adjournment. After, however, it has been explained to him on the date of his default what he is expected to do, it seems difficult to understand why he should be given more than one opportunity of doing it.

This much is clear. Until the courts make it understood that an order must be obeyed, there will not be great improvement in this or in many other matters, and it may be suggested with a certain confidence that, once a court lays down unmistakably that it will enforce an order that has been passed, there will be few instances in which the order is disregarded."

10. It is noticeable, how seldom an application for an extension of time within which to file the written statement—or indeed an application for an adjournment for any purpose—is resisted by the opposite party. It is useless to seek anything approximating to a real remedy in the opportunity, which already exists, of the opposite party to object. It almost appears, that the reason for the apathy displayed, is that the opposite party wishes to reserve to himself an opportunity of applying for an adjournment on inadequate grounds at a future date. The understanding appears to be that, if the defendant applies for an adjournment on the second hearing on inadequate grounds, the plaintiff prefers not to object, as he may wish to apply for an adjournment on inadequate grounds on the next date, and he hopes that his reasonableness will be reciprocated. This hope is frequently justified.

No solution will be found from the parties. The procedure must be made more strict. The evil is a real evil. We have come across instances in which the hearing in suits has been adjourned six or seven times or more for the filing of the written statement, and where the written statement has been filed six months or more after the defendant has come to court.

Pleadings.

11. When the plaint and the written statement are before the court, it is in a position to consider the pleadings.

The provisions of the present Code relating to pleadings were intended by the framers to introduce a new practice into India.

These are the remarks of the Select Committee upon the point.

"In our opinion it is most necessary that litigants in this country should come to trial with all issues clearly defined, and that cases should not be expanded or grounds shifted without reference to the true facts. For this purpose we think that the present system of pleadings in the mofussil, which is notoriously lax, should

be improved, and we have incorporated in the rules an Order on pleadings, which it is hoped, will lead to sounder and fairer methods of arriving at the real points in dispute."

In introducing the Bill, Sir Erle Richards made the following reference to this portion of the subject, and to the subject of discovery and inspection:—

> "I desire to call the attention of the Council to the new rules which have been inserted with regard to pleadings and admission. The Special Committee attach much importance to accurate pleadings; they think that a clear definition of the real points in dispute in a suit is a matter of substance, because it makes for economy both of time and expense. They also attach importance to the existence of provisions for enabling facts and documents to be admitted, thus doing away with the necessity for formal proof. The rules on this heading have, therefore, been remodelled; and it is hoped that High Courts will see that they are followed by subordinate courts. It may be that some of these provisions will be found too elaborate for some mofussil courts, but if that be so it will be within the power of High Courts to withdraw them either generally or in regard to particular areas."

The importance of this question can hardly be exaggerated. Pleadings are the foundation, and if the pleadings are bad, delay in decision follows as a natural consequence, and the decision itself may be unsatisfactory. The position has been stated succinctly by Lord Parker of Waddington in Banbury *v.* Bank of Montreal. 1918 A.C., 709.

"The fault lies in the system which permits a plaintiff to set up at the trial, without amending his pleadings, a case other than that put forward in the statement of claim. When this is done the new case cannot possibly be formulated with the precision necessary to elucidate either the principles of law which may be applicable or the issues of fact which may be involved. Both the counsel and the judge labour under great disadvantage and a miscarriage of justice is all too likely to occur. The system of pleading introduced by the Judicature Acts was, no doubt, intended as a compromise between the rigid system which prevailed in the common law courts and the loose prolixity of the bill in Chancery. The bill stated all the facts at great length, and prayed such relief as the petitioner might be entitled to in the premises. The chancellor or vice-chancellor had to find out for himself what might be the equities between the parties. For this he could take what time he liked, and often did take a very long time. The present practice appears to me to have most of the vices of the old procedure in Chancery. There are pleadings, it is true, but the pleadings are, for all practical purposes, disregarded. The plaintiff is allowed to prove what he likes and set up any case he can. The judge has no longer to deal with a case formulated on the pleadings, but to make up his mind whether

on the facts proved there is any and what case at all. This disadvantage is accentuated when there is a jury, for the judge cannot take time to consider the matter, and counsel have not considered it as they would have done had they been compelled to embody their case in a statement of claim. Under these circumstances there is little wonder that a judge should misdirect a jury, and that the real questions of law or fact should, as in this case, emerge only after prolonged discussion on appeal. Had the plaintiff, after admitting that it was not within the scope of the bank's business to advise on Canadian investments at large, been compelled to amend his statement of claim by stating the special circumstances which, as he alleged, brought it within the scope of the bank's business to advise the plaintiff on this particular investment, I doubt whether the action would have proceeded further, and I am clearly of opinion that the question of authority would not have been left to the jury. The impossibility of the plaintiff's case would have been manifest on the record."

12. The principal rules as to pleadings are given in Order VI. They are summarized as follows in Mulla's Commentary:—

(1) The whole case must be stated in the pleadings. That is to say all material facts must be stated (Order VI, rule 2).

(2) No matter of law is to be stated.

(3) Only material facts are to be stated. The evidence, by which they are to be proved, is not to be stated (Order VI, rules 2, 10, 11, 12).

(4) Immaterial and unnecessary facts are not to be stated.

(5) The facts are to be stated concisely.

(6) It is not necessary to allege the performance of any condition precedent; an averment of performance is now implied in every pleading (Order VI, rule 6).

(7) It is not necessary to set out the whole or any part of a document, unless the precise words thereof are necessary. It is sufficient to state the effect of the document as briefly as possible (Order VI, rule 9).

(8) It is not necessary to allege a matter of fact which the law presumes, or as to which the burden of proof lies on the other side (Order VI, rule 13).

Very few pleadings in the suits examined comply with these rules. In the majority of instances no attempt is made to comply with them. It is the exception rather than the rule for all material facts to be stated. While material facts are omitted immaterial facts are stated. The evidence by which it is proposed to prove the facts is often set out at length. Allegations as to law are inserted. Documents are set out at length. The pleadings are generally too long, and in some instances prolix to a degree. Written statements are worse than plaints. The main defects are prolixity, argument-

ativeness, a disclosure of immaterial facts, and a suppression of material facts which result in a failure to disclose the exact nature of the case set up, and which provide an opportunity for a change of front. It is not easy, however, to devise a remedy.

Those in India who are responsible for the framing of pleadings have been trained for many years under an older system. It is hard to get them to change their methods. As the representatives of the plaintiff and the defendant accept equally the old principles no remedy will usually be found in the power given to each side to apply for the striking out, or amendment of matters in pleadings. Neither side sees anything objectionable in the errors of the other side. There is no recognized authority in India from which a practitioner can obtain the assistance in preparing pleadings which an English lawyer enjoys. The framers of the Civil Procedure Code hoped that the use of the forms inserted in Appendix A (which under Order VI, rule 3, are directed to be used, wherever applicable, and followed, where not applicable) would afford sufficient guidance. The use of these forms is consistently neglected, but, in any circumstances, those who have no other direction will not obtain satisfactory results from their study. The first requisite is to train pleaders to draft, and this training will be assisted appreciably by the preparation of a work on pleadings in India on the lines of Bullen and Leake. We commend this suggestion to the members of the legal profession.

In the end it is left to the presiding officer to exercise the important duty of preventing the parties offending against the rules. If he endeavours to perform this duty—few make the attempt—he is frequently represented as dictating to counsel how they should frame their cases. His powers in dealing with offending pleadings might be increased, but the remedy will not lie in the striking out of pleas so much as in the improvement of the Bar. As the presiding officers of courts in India are overburdened with other duties, they have further very little time for this purpose.

If it be possible to introduce the registrar system one of the duties of the registrar could be to correct the pleadings and reduce them to those which are really essential, eliminating everything else. We suggest that efforts should be made in this direction. We see, however, at the same time that at the beginning more time may be lost by arguments as to whether a certain plea should or should not be taken than by leaving unsatisfactory pleadings as they are.

There is room, however, for one change which will make for improvement. In some parts of India, the pleadings are drafted by lawyers' clerks or petition writers. They are taken over by the pleader when he is engaged, and no responsibility is accepted by him for their contents. Under Order VI, rule 14, a pleader has to verify, only if he presents the pleadings. We suggest that a rule should be added, by which the name of the draftsman should appear on the pleading, and by which the pleader in charge should be obliged to add a certificate that he has accepted the pleading and takes full responsibility for it.

FILING DOCUMENTARY EVIDENCE.

Discovery.

13. The next period during which delay occurs is the period when the law requires documentary evidence to be filed. Great delay occurs here. This is accentuated by the manner in which the documentary evidence is handled by the courts.

Before the English rules as to " Discovery " were introduced into the Code of 1908, the production of documentary evidence in India was in accordance with a somewhat rudimentary practice contained to some extent in rules requiring the filing or production in court of documents, copies of documents or lists of documents. The English rules now subsist side by side with others which embody with some amendments the old Indian practice. On the subject of discovery of documents the present Code in effect presents us with two different strata, the old rudimentary practice the basis of which is to require parties to lodge in court the documents on which they intend to rely, and the English practice in which the question of lodging anything in court seldom arises, and which provides specially for the due disclosure by a party of documents which may assist his opponent's case or relieve his opponent from the burden of giving unnecessary proof. The English practice may be regarded as consisting of three types of discovery. It is not confined to documentary evidence. First there is the right to administer interrogatories. Second the right to require from the opposite party on oath a statement of the relevant documents which are or have been in his possession or power. Third the right to call on him to admit either facts or documents. It is plain that the English practice overlaps the old Indian practice, and that the present Code does not dovetail the two successfully. A diligent study of the rules in Order XI will do much to enable a neophyte to grasp the main principles of the law of discovery, but to apply those principles in practice requires a considerable amount of experience and a certain knowledge of case law. The field is not as yet covered by Indian decisions, though there is now no lack of annotated editions of the Code which give ample assistance and direction to a competent lawyer. Outside the High Courts and a very few other courts the subordinate judiciary and the legal profession do not appear to have awakened to the fact that there is a " law of discovery ", still less to a realization that it is a highly important and not altogether easy branch of law, based on important principles, and that without a thorough knowledge of those principles and a steady application of them, none but a simple case can be properly prepared or tried. The possessor of a copy of the Code who has looked at the rules in Order XI is not equipped forthwith with the necessary knowledge. It has been and still is a serious defect in the legal training given by most Law Schools in India, that they have paid no attention to or at least laid no stress whatever upon this important branch of the law.

14. The framers of the Code anticipated that in mofussil courts the members of the Bar would not easily or quickly accustom themselves to the new procedure provided and would not avail themselves of its provisions. They, therefore, inserted in section 30 of the Code a provision which gives the court authority to order discovery and inspection of its own motion. Their anticipations have unfortunately been fulfilled and the power given to the court has not been utilised. When any real "discovery" has been enforced under the new provisions in mofussil courts it has usually been because leading counsel from outside have been employed to conduct the cases. The novelty of the provisions in question is by no means the only cause of their neglect: if so, they would before now have come into more general use. Circumstances in India do not favour the methodical preparation of cases. The poverty and ignorance of the litigant, the sporadic engagement of the pleader for particular purposes only, *e.g.*, for the written statement, for the hearing; the ineradicable tendency to give him his instructions late and even then piece-meal are all against good ground work. Again when meeting a "false case", parties and their advisers often think that to insist on proper particulars is merely to ensure that their opponent will have worked out his false story more fully and tutored his witnesses more carefully. Again, the law of discovery depends on the first principle that the party's oath is *prima facie* final save in special cases. But the chief reasons why the law of discovery is not applied are undoubtedly that the great majority of cases are simple cases about matters of small money value, and because the old practice as to lodging in court the documents relied on is for so many cases regarded as sufficient.

15. It is clearly necessary to retain the requirement that at an early stage of every case each party should give a list of the documents in his possession upon which he intends to rely. It is also necessary to maintain the requirement of lodgement in court as being the best safeguard against forgery, unfounded charges of forgery, and the supression of documents. Where the parties commence by handing over to their lawyers all the documents which they have, so that A's lawyer can readily inspect B's documents at the office of B's lawyer, production in court is not necessary until at the hearing the document is tendered in evidence. In India it is otherwise. To bring documents into court at an early stage is the best protection a litigant can provide for himself against the frequent and almost common-form suggestion of forgery or falsification. It affords also the easiest and most convenient facility for inspection.

16. This course however brings its own difficulties. Only those who are fully conversant with the complicated suits for interests in land that so frequently come before Indian courts can realise the enormous mass of unnecessary documents that is sometimes brought into court and put upon the record under present methods. Documents which prove nothing material to the case or bear only upon small and remote points upon the utmost fringe of the con-

troversy, are filed in hundreds. Very generally there is a complete absence of arrangement: even as regards ordinary correspondence it is nothing unusual to find that the first letter is the seventh in order, and that replies generally precede the letters to which they are an answer. The practice is so bad at times, that the admissibility of some documents is not decided till the judgment, and it is not unknown for the matter to escape attention, and the question of admissibility to remain undecided at the end of the case. Sometimes a mass of documents is brought into court in a locked box, copious allegations being made in the written statement as to the danger of theft or forgery if the plaintiff be allowed to go near them.

17. It is not unknown for parties to go to the High Court on questions of the right to " inspect a document " without either party having obtained an affidavit of documents from the other, so as to ascertain what documents the other has. It is plainly necessary therefore to lay down quite clearly that any question as to whether a party has or has not in his possession or power any particular document, any question as to whether its discovery can be compelled on the ground of relevancy, any question of privilege, should be agitated only under the provisions of Order XI. We would further draw the attention of presiding officers of courts and of the Bar not merely to the necessity of treating the question of discovery seriously, but of attending to it systematically. Presiding officers at the time of settling issues or immediately thereafter—in some few cases possibly even before—should regard it as part of their ordinary duty to see to this, even where parties or their advisers fail to do so. Their powers under section 30 are express and clear. In complicated cases a very great saving of time will result. Title suits and commercial suits should never be allowed to drift to trial. Even in the smaller suits it will frequently be possible to avoid useless expense and delay to parties and to remove from our courts the reproach that must always attach when futile and unnecessary controversy is permitted. If parties and their advisers understand that a false answer to an interrogatory or a false and insufficient affidavit of documents will result infallibly in the gravest inferences being drawn against them—we know of nothing more fair and reasonable than such a rule—they will conduct themselves accordingly after a time. We do not minimise the difficulty, nor do we suppose that it is easy to exact a proper standard of candour or of diligence, but not enough—not nearly enough—progress has been made in the sixteen years that have elapsed since 1908. We fully appreciate that there is grave injustice in attributing the blame in this matter solely to the Bar or the subordinate judiciary. In their efforts after improvement the latter have much too frequently been " let down " by superior courts: it would enormously facilitate the work of the better class of practitioners as well as of the subordinate courts if it were adequately appreciated in High Courts whether in appeal or revision, that " flabbiness " which in respect of the subordinate judiciary is at worst a " besetting sin " is in the superior courts a pestilence which affects all the courts below them.

18. The rules as to " production " of documents in the sense of lodging them in the office of the court before the hearing are at present too strict, too lacking in precision and too little insisted on.

Under Order VII, rule 14, the plaintiff is obliged to produce in court at the time the plaint is presented any documents in his possession or power upon which he sues. This rule should be strictly enforced.

The plaintiff is further required at the time of the presentation of the plaint to furnish a list of all the documents whether in his possession or not on which he proposes to rely as evidence in support of his claim. The defendant is not required under the provisions of Order VIII to file any documents with his written statement. Orders VII and VIII do not lay down a rule as to when documents are to be produced. The rule on that subject is to be found in Order XIII. This rule was inserted in the Code of 1908. The Committee who advised on the Bill stated in their report " We have altered the language so as to compel the production of documents at the first hearing. In our opinion this will act as a substantial check on the fabrication of false evidence."

Order XIII, rule 1 enacts that the parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in court, and all documents which the court has ordered to be produced, and rule 2 states that no documentary evidence in the possession or power of any party, which should have been but has not been produced in accordance with the requirements of rule 1, shall be received at any subsequent stage of the proceedings, unless good cause is shown to the satisfaction of the court for the non-production thereof; and the court receiving any such evidence shall record reasons for so doing.

19. The undue leniency of courts in admitting documentary evidence at late stages of the hearing has deprived Order XIII, rule 1, of any sting. It is not even the practice to admit them only upon terms of depriving the defaulter of his costs. There is no sufficient sanction to prevent the rule becoming a dead letter. If every litigant is presumed to be too poor and ignorant to behave with candour and commonsense, if it is always unjust to visit on him the fault of his pleader, then civil justice must of necessity be regarded on the footing that the marvel is not that it works badly but that it works at all. A court which undertakes to dispense justice, whether the parties put it in a position to do so or not, ends always as a byword for injustice. We do not seek for one moment to take away the discretion of courts in admitting documents however late, but we find it difficult to be convinced as to many courts, that they regard themselves as having any real discretion even in plain cases of default. The poor and ignorant litigant who keeps back a material document can in general be visited with the full penalty, not only with the completest justice but greatly to the public benefit.

If he had a shrewd idea that this was a general view, neither poverty nor ignorance would take the particular form of non-disclosure.

20. It is however very necessary before acting on these principles to make quite certain that the rules do not require " production " of documents at too early a stage. So long as the pleadings cannot be taken as themselves making clear the issues it is plainly unreasonable to exclude or even to threaten with exclusion any documents, unless the party has had a reasonably full opportunity to consider the issues, to consider how to meet each issue, and to consider the relevancy of any documents he may possess in the light of the issues. If production is required at the earliest moment with a view to prevent forgery or because the main documents will be useful in settling the issues, there ought always to be a later time fixed within which a plaintiff or defendant can supplement his list. This should be so done as to call the specific attention of the parties to the opportunity. Otherwise some people, to be safe, will lodge in court every document they have—relevant or irrelevant. Others will lodge none and have a grievance when at the last moment documents are tendered and excluded.

We think that Order VII might provide for production by the plaintiff not only of the documents, if any, on which he sues but of any other documents upon which he relies if in his possession or power: this to be in addition to the list at present required. The defendant filing a written statement should also be required to lodge in court any document in his possession or power upon which he relies as well as a list of all documents on which he relies. This will be an improvement on the provisions of Order XIII, rule 1, which refers to the " first hearing," a phrase which in practice is a little nebulous. When issues have been settled, the court should appoint a definite date by which each party is called upon to file supplementary lists. It might be possible to provide in effect for the " exchange " of such lists: neither party to see the other's list till he has filed his own: any documents comprised in such lists which are in the possession or power of the parties to be filed therewith. Thereafter any application by a party to add to his list should be required to be brought within a month: otherwise the court, save for very special reasons, should exclude further documents.

21. It is very difficult to provide effectively for the cases in which a mass of documents is brought into court. In England the court would have no concern with the matter till the plaintiff's or defendant's case is opened. Out of a mass of documents disclosed in the affidavits of documents, some would be tendered in evidence and either admitted or proved. Others in the possession of the opposite party would simply be called for and put in. The business of rummaging through a mass of documents disclosed by the other side is done by the party's solicitor who inspects them and bespeaks copies of those which he wants. Relevancy of a document and its admissibility on this and on certain other grounds can only be decided at the hearing. It often depends on the particular state

of the evidence at the moment at which the document is tendered. It is in opening his case that counsel makes clear, if necessary, his purpose in relying upon any document.

The spectacle of a judge or other judicial officer going through a mass of documents before the hearing in order to find out the relevancy of each and to set aside those that cannot conceivably be relevant is indeed melancholy. It results partly from a confusion between " production " in the sense of lodging a document in the custody of the court to prevent the suspicion or the chance of forgery, and " production " in the sense of tendering a document in evidence at the hearing at the time when it is being proved or admitted. The chief causes, however, lie in the circumstance that parties and their pleaders will not agree to co-operate to prepare their cases so as to present their dispute to the court in a reasonable way and that the very necessary " opening " is altogether omitted. Doubtless it will be of service that the judge should preside over a prolonged inspection of documents, try to persuade the parties to make proper admissions, and try to help them to clear their minds as to the real points of a case. But, though in small cases the judge may well do this sort of work at the settlement of issues, this is not really a judge's work and complicated cases are not as a rule best approached, so far as the judge is concerned, by an attempt to master a mass of documents. A competent Bar should not require this form of assistance. This kind of preliminary work when it has to be done at all should not be part of the hearing, but should be done well in advance in order that when the hearing commences it should go on continuously.

22. The law in England (and now in India) permits the administration of interrogatories by a party to his opponent to obtain admissions which will facilitate the proof of the case of the party who delivers the interrogatories. A decision of the Calcutta High Court (I. L. R. 17 Cal., 840) of 1890 (before the present Code came into force) was against granting leave to a party to ascertain the nature of an opponent's case through interrogatories, but the practice is now the same in India as it is in England.

Further, a party may by notice in writing call upon the other party to admit for the purpose of the suit only (Order XII, rule 2) any documents and (Order XII, rule 4) any specific facts mentioned in the notice. Order XII, rule 2 contains the salutary provision that, when a party has refused or neglected to admit, the subsequent costs of proving the documents should be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs, and that no costs of proving the documents should be allowed unless such notice is given, except where the omission to give the notice is in the opinion of the court a saving of expense.

We draw the attention both of the presiding officers of the courts and of the members of the Bar to the very great saving of time that will be effected if these provisions of the Law are used intelligently in the more important cases. They will be found of

peculiar advantage in the hearing of the larger title suits and certain commercial suits. It is not only in the more important suits that they can be used with advantage. There will be found occasionally suits not of very great importance in which much time and money will be saved if these provisions of the Law are complied with.

23. It is not practicable or desirable to lay down inelastic rules as to the exact stages when these acts should take place. In small and unimportant cases there will be no difficulty. In the less important cases there will be very little. But in the larger and more complicated cases it will be usually advisable after the documents have been lodged in court to allow at least one date (and more if necessary) before issues are framed for admissions, discovery interrogatories and the like, and to fix if necessary one or more dates after the issues have been framed for the completion of this preliminary work.

Issues.

24. There is too often great delay before the issues are framed. The method of framing issues produces frequently further delay. Under Order X the court is directed to examine the parties or their pleaders in respect of the matters which they admit or deny. The words of Order X, rule 1 are:—

> "At the first hearing of the suit the court shall ascertain from each party or his pleader whether he admits or denies such allegations of facts as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The court shall record such admissions and denials."

This duty under the law must be performed by the court. It is comparatively rare to find a court which makes the examination. Under Order XIV, rule 1 (5) "at the first hearing of the suit the court shall, after reading the plaint and the written statement, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or law the parties are at variance and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend." The court under the law is expected to examine the parties, and is required to read the pleadings and then to frame issues. Parties are examined at this stage in the Punjab on forms prescribed. We have, however, discovered that in certain provinces the courts hardly ever attempt to comply with the law, do not read the pleadings, and leave the parties to frame the issues themselves. It might have been hoped that this unauthorized procedure would at any rate result in the issues being fixed at any earlier date, but this has not been the result. The courts who adopt this unauthorized method are usually the courts in which the delay in framing issues is most marked.

We have found instances in which the framing of issues was postponed from date to date during the period of several months, and where the issues were finally framed by the pleaders without the presiding officer applying his mind to the subject.

The procedure so followed is illegal. It is further intensely unsatisfactory. Although it is not for the court to tell the parties, that their dispute should be confined to certain points and should not extend to other points, and, although it is for the parties to decide for themselves the points on which contest is desired, the contest must necessarily be confined to the subject matter, and be consistent with the nature of the relief sought, and the issues must cover every point rightly in dispute.

Those, who support the present irregular practice, argue that the parties' pleaders presumably know best the points which should be contested. An examination of the records, however, shows that pleaders cannot always without guidance determine these points satisfactorily. In too many cases it is found that issues which are immaterial to the result are framed, and that issues which are material to the result are omitted.

Further, if the court leaves the framing of issues to the parties and does not read the pleadings, the presiding officer is ignorant of the nature of the case, and does not know when a witness is called what bearing that witness' evidence has upon the contest.

Not only is the law clear. The duty of the court to frame the issues itself and frame them properly is laid down in many circulars and rules of High Courts. Presiding officers ignore the directions of the law and the orders of their own High Courts and continue to leave the framing of issues to other persons. There is no reason of course why they should not take suggestions from the parties as to the issues to be framed. It would be unwise for them not to take such suggestions. The taking of suggestions is, however, a very different matter from the ignoring of their own responsibility. When we endeavoured to ascertain the views of presiding officers as to why they did not follow the clear law on the subject, we were often met with the reply that under present conditions presiding officers have no time to comply with the law and the rules.

This objection will not survive examination. If the law directs presiding officers to perform a particular duty, that duty must be performed and time must be found for its performance, but apart from that, this objection is unsustainable. In suits, where the contest is slight, the examination of the parties and of the pleadings should occupy a very short time before the issues are framed. These cases occur for the most part in the courts of munsifs. There, although the work is frequently very heavy, the time necessary for the purpose is not considerable and can be found. In suits in which the contest is severe, considerable time must occasionally be devoted to the purpose, but those suits occur usually in the courts of subordinate judges who do not decide many contested suits in a year. When the preliminary work has been done carefully and intelligently, there will be a very great saving of time in the later stages. Three hours spent upon the examination of parties, the studying of the pleadings and careful scrutiny of the documentary evidence may mean five or six days saved during the subsequent hearings.

CHAPTER 4.

Hearing of contested suits continued. Opening the case. Oral evidence. Examination-in-chief. Cross-examination. Lists of witnesses. Expediting attendance. Recording evidence. Failure to hear suits from day to day. Arguments. Adjournments. Judgment. Decree.

Opening the case.

1. When the parties have their oral evidence ready, the law directs (Order XVIII, rule 2) that the party having the right to begin should state his case, and produce his evidence in support of the issues, which he is bound to prove. The other party has then to state his case, and produce his evidence, if any, and may then address the court generally on the whole case, the party beginning being permitted to reply generally. The law is clear on the subject. The procedure is the procedure well known in all courts in England where the plaintiff's counsel commences by "opening" the case—to use a familiar expression—and then puts his witnesses into the box. The same procedure is obligatory in India. Nevertheless, it is seldom followed outside the High Courts.

The reason given us for the refusal to follow the law on the subject was usually that the opening speech is omitted, to save time. It was occasionally added that, as a general rule, the pleaders in less important cases do not know sufficient of their own case to be able to open it. We wish to draw attention to the absolute necessity of opening the case, in order to save time. The result of departing from this salutary rule of procedure tends to increase delay for the following reasons.

In the first place when a party does not open his case, and does not state exactly the line which he proposes to take, it is open to him to change the case which he originally had in mind, and not only to call the witnesses whom he had originally intended to call, but to call other witnesses on different points to support a different case if he sees that the case which he had in mind is not progressing as satisfactorily as he desires. If the case is not opened, a party cannot be confined to his original case, for the court does not know what the original case is. True, the court should have read the pleadings and framed the issues, but even if it has done so, it will not always have obtained sufficient information to know the points to which contest will be confined. Further, the failure to open the case puts the presiding officer at a disadvantage in dealing with the evidence of each witness as he is called.

Oral evidence. Examination-in-chief. Cross-examination.

2. The next stage is the most important in the whole of the hearing. This is the stage in which oral evidence is actually heard.

The impression created in the minds of those, who are acquainted with the procedure in English Courts of Law, as to the production of evidence in Courts in India is that there is a tendency in India to over-prove essential allegations. There is further a tendency to prove and to over-prove unessential allegations. Such observers wonder at the extraordinary elaboration with which the examination-in-chief is conducted. Every sort of detail, however distant may be its bearing upon the value of the evidence of the witnesses, is brought out, and much time is taken up in eliciting and recording unessential particulars to which no reference is usually made in argument, and to which no reference can be made usefully.

Even more surprising is the cross-examination. It is not too much to say that cross-examination frequently extends over a period which is more than six times as long as is necessary to produce useful results. The waste of time is most noticeable in cases of larger value, especially in which the dispute relates to valuable landed property. It is difficult to exaggerate the unnecessary labour and the delays caused thereby.

It is not easy to devise a remedy. The litigants prefer that examination and cross-examination should be conducted in this manner, and the methods are the traditional methods of many District Bars. We feel that we should not be justified in suggesting alterations in the law by which presiding officers would be authorized to terminate the examination of a particular witness, or to refuse to hear additional witnesses on any particular point. It seems only possible to wait, till litigants begin to see for themselves that in their own interests there should be expedition. At present we must leave the solution to the good sense of the Bench and Bar.

3. Although it is practically impossible to reduce the hearing of evidence under present conditions to the minimum sufficient, the evidence necessary for a correct decision will be kept within some bounds, if rules are made which will compel the parties to consider, before they call their evidence, the evidence necessary to establish their points and which, while giving them ample opportunity for the production of sufficient evidence at the beginning, will tend to restrain them from supplementing it unnecessarily at the end.

The present tendency is to produce so many witnesses, and, after observing how they fare, to produce so many more, and then so many more. This can be done under the present law. Although there are some restrictions to the issuing of summonses for the attendance of witnesses after a certain stage of the hearing has been reached, it is open to the parties to produce at any time witnesses who have not been summoned, and the court must hear them whatever be its surmises as to the value of their evidence, and however unprofitable the work of recording such evidence may be.

Lists of witnesses.

4. If a rule is made, whereby at a certain date the parties may be required in a certain class of suits to file lists of witnesses whom

they propose to produce and are not allowed to increase that number without a very special reason, there will be enormous saving of time effected. Under this rule it would be open to them either to obtain the attendance of witnesses by summoning them, or to take personal responsibility for their attendance.

The following are the objections to this proposal. It can be urged that such rules will interfere with the inherent right of the parties to call as many witnesses as they desire at any time until the hearing is concluded, and it can further be objected that, if the parties are required to file such lists, a better opportunity will be given to the other side, by obtaining the names of the witnesses at an earlier date, to endeavour to tamper with them and persuade them either to refrain from giving evidence, or to give evidence contrary to the interests of the party who desires to call them.

In respect of the first objection, there is no inherent right in the matter. Parties, as the law stands, cannot produce any evidence they desire. They are bound by certain provisions of the law. They cannot, for example, produce evidence which is not admissible under the Law of Evidence.

There is no general right. When the matter is considered from the view of the public benefit, it is necessary to examine the disadvantages of the present system. They are so numerous that some attempt must be made to grapple with the question in the public good and if the objections are unreasonable, it is desirable that they be disregarded.

In respect of the second objection it may fairly be said in its favour that under the present conditions in India, it is by no means unknown for the opposite party, as soon as he knows that certain witnesses are being called against him, to use every means in his power to dissuade them from assisting his opponent. Undoubtedly the sooner he knows the names of these witnesses, the greater will be his opportunity.

But it may be argued, that even in these circumstances it is better to let each party know at once what the evidence on the other side will be. The large majority of litigants are not dishonest. It is only in a minority of cases that there will be an attempt to tamper. Under present conditions the opportunity is there in all cases in which witnesses are summoned—and they are summoned for the most part.—As soon as the summons is applied for, the other side is in a position to approach the witnesses.

Further, it may well be argued that a witness who is likely to be approached successfully will not be a very valuable witness at any time. Something should be said for the honest litigants who are in the majority of cases seriously prejudiced by the courts permitting the parties to hold back the names of their witnesses as long as possible, for, when the names of the witnesses are known to the opposite side only a very short time before they are called, the opportunities of obtaining materials on which to cross-examine them are restricted considerably.

The inordinate length of cross-examination is due to a certain extent to the fact that the counsel frequently are deprived of material for effective cross-examination by the witnesses being sprung on them at the last moment. The result is that the cross-examination is apt to become what is known as a "fishing cross-examination," the witnesses being cross-examined at random at an inordinate length in the hope that something may be extracted from them by accident.

But even if it be accepted that a party should not be given the opportunity of knowing till the last moment the nature of the evidence which will be called against him, the objection can be met in a very simple manner. If so desired, these lists need not be made public; they can be kept in sealed envelopes and opened only on the day when evidence is first led.

Attendance of witnesses.

5. We do not propose to lay down here any rules for the guidance of courts in expediting the attendance of witnesses, but wish to make some general remarks on the subject.

When a party applies for a summons to obtain the attendance of a witness, and does not make the application or deposit the process fees and diet money in time to enable the witness to be served and reach the court upon the day fixed for hearing, the party should not be permitted a second opportunity for producing that witness, unless he can show good cause for his previous omission, and in any circumstances should be allowed no costs for the subsequent production, and should be made to pay the costs of the other side, if any have been incurred by the default. When a party has agreed to produce personally a particular witness on a particular day, and does not do so, he should ordinarily be granted an adjournment to produce him on a subsequent date, either on process or without, but only under similar restrictions. When a witness has been served, and has failed to attend, unless it appears that his non-attendance is due to causes not within his control (in which case an adjournment should be granted) the party producing him should be given the opportunity of applying for coercive process to compel his attendance, and if he refuses to apply for such process the witness should be withdrawn.

Record of evidence.

6. A considerable amount of time, and much valuable energy are expended in the actual recording of evidence in courts other than High Courts.

Section 138 of the Code of Civil Procedure directs that, where the Local Government so ordains, certain judges may be permitted to record evidence in English in cases in which an appeal is allowed. Further, rules as to recording of evidence are contained in Order XVIII, rules 5 to 13. When the judge is permitted to record in English, there is only one record. Evidence is thus re-

corded in Bengal, Assam, Bihar, in almost all the courts in Madras. When it is thus recorded the judge takes down in a narrative form, in all cases in which an appeal is allowed, everything that the witness has said. What he has written is read over to the witness, if the witness understands English, and translated to him in his own language if he does not understand English. The statement is then signed by the witness.

Where the judge is not empowered to record the evidence in English, the evidence is usually taken down in full by the clerk of the court in the court vernacular in narrative form. The statement is read over to the witness if he understands the court vernacular, and if he does not understand the court vernacular it is translated to him in a language which he does understand, and is signed by him. When the evidence is recorded by the clerk of the court the judge makes a memorandum of its substance. This memorandum is signed by the judge, and forms part of the record. In practice the memorandum is very often a word for word transcript of the note of the clerk of the court. Some judges record an abstract. In a few instances complaints have been made that the judge's abstract is not sufficient. Generally the memorandum is apt to be too diffuse instead of too compressed.

In cases, in which an appeal is not allowed, the evidence of the witnesses is not taken down at length and the judge makes a memorandum of the substance, which is signed by him, and forms part of the record.

When the judge alone records the evidence in full, he is apt to be so occupied, as not to have sufficient opportunity of studying the witness.

7. It has been suggested to us by many witnesses that the remedy will lie in the employment of shorthand-writers who will take down *verbatim* a transcript of the evidence. There are serious objections to that suggestion.

In the first place it will be very difficult to obtain sufficient shorthand-writers for all the courts required who would be capable of taking down evidence correctly in a narrative form. If they take down question and answer, the time taken in checking and correcting the long hand note will be excessive. It is common experience that it takes nearly one quarter of the time devoted to dictation to check and correct a shorthand-writer's note. The number of shorthand-writers required would be very great. Evidence is frequently heard for five hours a day or more. No ordinary shorthand-writer can work consecutively on continuous work for so many hours. Typing the long hand note takes twice or three times as long as the time spent in dictation. So if a heavy case continues from day to day there must be relays of shorthand-writers for the court.

There is a further difficulty. So long as the practice continues of reading out to each witness his statement or of translating it (shorthand-writers will of course record in English) it will be necessary, in order to translate the shorthand note to the witness, for

the shorthand-writer, in addition to being a trained steno-typist, to be also conversant with possibly more than two languages. The alternative would be to bring the witness back a day or so afterwards when the long hand note was ready.

8. In the debate introducing the draft bill to amend the Code of Civil Procedure of 1901 Sir Thomas Raleigh said:—

> "We free the judge from the mechanical necessity of taking down every word of the evidence and of making a note of every objection to evidence. And finally when it comes to judgment we empower the judge to deliver his decision orally, provided that a written judgment is afterwards prepared, for the accuracy of which he is to make himself responsible. These proposals will probably be criticised and we may be told that in this country mechanical rules are necessary to compel the judges to take all evidence which they ought to hear, to deal fairly with objections, and to state fully the reasons for their judgment. I am not, as at present informed, convinced that this is a sound doctrine. If your judges are competent you can trust them, and if they are not, I am not sure that any mechanical rules will compel them to decide their cases rightly."

Sir Thomas Raleigh was referring to the following clause in the Bill:—

> "189. (1) In cases in which an appeal is not allowed, and in other cases or classes of cases with respect to which the Court or the Judge has been specially empowered in this behalf by the Local Government, acting on the recommendation and with the concurrence of the High Court, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make, either in the language of the Court or in English, a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge with his own hand, and shall form part of the record."

Its necessity was thus explained in the statement of objects and reasons.

> "The efficiency of the Civil Courts, is, at present, impaired by the burden of the clerical labour involved in recording the evidence upon which it is the judge's more legitimate function to adjudicate. In sections 260 and 355 of the Code of Criminal Procedure, 1898, a magisterial note of evidence is treated as sufficient in certain appealable cases, while more recently the procedure there formulated has been given a general application in suits for the recovery of rent by section 148 (*f*) of the Bengal Tenancy Act, 1385. It is be-

lieved that, in an immense number of even appealable cases, a record *in extenso* of every incidental statement of the witnesses serves no useful purpose, and that a note taken by a judge of experience as a lawyer rather than a reporter would be sufficient for the superior court and would conduce to promptitude and efficiency at trials in first instance. In appeals involving no questions of exceptional difficulty or complexity, paper books, comprising over 3,000 pages of oral evidence, have actually been prepared, the result being, not only inordinate expense and delay in printing, but a serious obstacle to business by rendering the picking out of the facts an arduous task for the judge in appeal. It is accordingly proposed to expand the provision by authorizing the Local Government, on the recommendation and with the concurrence of the High Court, to specially empower either a court or any particular judge to take down only a memorandum of the substance of the evidence in all cases or in particular classes of cases, whether appealable or not."

Although the proposed alterations were not unfavourably received on the whole, the amendment was deleted from the Code of 1908, which replaced the draft of 1901. That Code while leaving the procedure as before gave to the High Courts the power to alter the procedure in exercise of their rule-making power, and it is open to the High Courts to take action in the matter.

9. There appears to be no justification for the continuance of the present antiquated system. In England the sole record in original civil trials is the note which the judge makes of the substance of the evidence for his own information. It is accepted that the judge, in order to arrive at a correct decision on the evidence, will record every thing of importance, and this note of evidence is all that is required. In our opinion senior presiding officers of trial courts in India are reliable, intelligent and conscientious. Sir Thomas Raleigh held the same opinion in 1901. The standard has improved since. An examination of their judgments shows that they fully realize their responsibility, and are most anxious to have before them sufficient materials for decision. Senior officers have almost invariably small cause court powers. They have in exercise of these powers to decide suits which in some instances are of considerable importance, in which there is no right of appeal, and are then not required to maintain a full record. When such officers are exercising appellate jurisdiction their decision upon facts is final. It is anomalous that while they are entrusted with powers such as these they should be treated as though they were incapable of deciding for themselves what is a sufficient note for the purpose of the decision of a case.

We recognise that it would be unwise to entrust officers from the date of their appointment with authority to record evidence in this manner. We therefore suggest that an officer when

first entrusted with judicial powers should record evidence on the double record system, and should make a full memorandum of the evidence so recorded or where the single record is employed should continue as at present. When his superior authorities are satisfied that he is capable of making a satisfactory memorandum, he should be allowed to make it, and that memorandum alone should be accepted as record of the evidence. When such a memorandum is recorded, the reading out of the evidence to the witness and getting it signed by him appear to us an unnecessary waste of time.

10. In the Province of Oudh under the special provisions of section 19, Act XVIII of 1876, the presiding officer is required only to record a "note of the essential points of the evidence of each witness." The practice in that province is much the practice which we advocate. But we suggest that if the practice be introduced care should be taken to avoid an elaboration of record which in Oudh deprives the procedure of much of its value.

Those who support the present system urge that for the purposes of appeal a complete record of each witness' statement should be in existence, and further that prosecutions for perjury will be rendered much more difficult if the system suggested be introduced. But the record will be sufficient for the purpose of appeal. The present record is unnecessarily full. It is a matter of common experience that counsel representing the appellant do not usually refer to as much as one quarter of the evidence on the record. When a case comes upon appeal it is almost invariably recognized that the greater part of the evidence on the record is useless and need never have been recorded.

In respect of the second point, it is sufficient to say that in England no difficulty arises in prosecutions for perjury from the use of the long note. There is never likely to be much difficulty in an important case of perjury in fixing an accused down to a particular statement by the oral evidence of persons who have heard him make it. In any circumstances so much more will be gained than what is lost that it is advisable to risk something under this head. If the system which we suggest be adopted the hearing of many of the longer suits will be considerably reduced.

Hearing from day to day.

11. The delay in hearing evidence is considerably aggravated when another provision of the law is disregarded, as it is systematically disregarded in certain provinces. Under Order XVII, rule 1 it is laid down that when the hearing of evidence has once begun, the hearing of the suit should be continued from day to day until all the witnesses in attendance have been examined unless the court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

The intention of this rule is clear. The hearing is to proceed from day to day. The practice should be, as in England, that the evidence should be recorded continuously without interval, unless

in very exceptional circumstances when something unforeseen or unavoidable has occurred.

The rule is plain. High Courts have laid down special instructions that the rule should be followed. It is only in certain provinces that the rule is followed. In those provinces we have been pleased to see that the supreme authorities have insisted effectively on its observance, and that the general practice is as the law requires. Unfortunately those provinces are exceptions. In other places the practice is to hear two or three witnesses on a certain date. Then there is an adjournment—sometimes an adjournment for a month—and the same process is repeated.

The result is lamentable. Neglect to follow the procedure laid down by law enables evidence to be fabricated, and improves the opportunities of those dishonest litigants who, seeing that the first batch of witnesses is not giving satisfaction, utilize the intervening period to manufacture evidence which it is hoped will give satisfaction. Failure to follow the correct procedure further leads to the filing of interlocutory appeals and applications.

We have discovered instances of judges endeavouring to show that they are really hearing a case from day to day when they are only devoting a very small portion of each day to the purpose. They take up a contested case, hear evidence in it for about an hour and then adjourn the hearing to the following day. By so doing they hope to show from their order sheets that they have been hearing the case from day to day.

Arguments.

12. When evidence has been heard, there is frequently much avoidable waste of time in larger cases over the hearing of arguments. The counsel in district courts do not usually take the trouble to have their arguments ready, as the last witness leaves the box. Generally they are inclined, in cases which are at all of a complicated nature, to postpone the preparation of their arguments for some days, and to request the court to adjourn the case. Such adjournments are too frequently given, and the arguments are frequently not completed on the first adjourned date.

Some courts do not even hear arguments from day to day. We have found instances where the arguments have commenced a month after the witnesses have been heard, where the arguing counsel has argued for one day, carried on his arguments on an adjourned date, and completed them on a third adjourned date and where the arguments of his opponent have been heard in a similar manner. It is difficult to understand how a presiding officer who has thus heard arguments piece-meal can be expected to appreciate them.

Adjournments.

13. This is as convenient a place as any in which to consider as a whole the question of adjournments. There is no place where

it has not to be considered, for the question of the unnecessary adjournment is with us at every stage from the day the plaint is filed to the day on which the final decree is signed, and there have been many previous references to the granting of unnecessary adjournments.

The Code clearly lays down that the granting of an adjournment is not a light matter. This is the rule. Order XVII, Rules 1 and 3.

> "The court may, *if sufficient cause is shown* at any stage of the suit grant time to the parties or to any of them and may from time to time adjourn the hearing of the suit..... Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit for which time has been allowed, the court may notwithstanding such default proceed to decide the suit forthwith."

It is clearly thus the intention of the Code that once a date is fixed a suit should be taken up on that date, and proceeded with until the day is over, and that when a party is not ready on that date he is liable to have the matter decided on the materials before the court. The court has been granted the necessary discretion to adjourn the hearing "when sufficient cause is shown," and the words "sufficient cause" have not been limited, because it is desired not to fetter the court's discretion. It is, however, a perversion of the words and a clear transgression of the law, when the courts in so many instances order an adjournment to suit their own convenience or on the flimsiest pretext to suit the convenience of one party or other.

There is hardly anything which we have not found in the cases examined which has not been considered "sufficient cause." A man has been ordered to file a written statement four weeks hence. He does not do so. His reason is that he has not had time to go through his papers. Two days were sufficient for that purpose. He has had twenty eight. His laxity is considered "sufficient cause" for a future adjournment. He is told to produce his evidence on a day six weeks ahead. Three days before the date fixed he applies for a summons for the attendance of a witness. Owing to the delay the summons is not returned on the day of hearing. An adjournment is given to resummon the witness, the party's laxity again being regarded as "sufficient cause."

There remain those adjournments which are granted to suit the convenience of the parties. Adjournments are granted in very many instances because one or other party does not wish to take up the hearing on the day fixed, because he has an engagement elsewhere. It is not by any means uncommon to find an adjournment granted because the plaintiff wishes to attend a friend's wedding. A very common reason for granting an ad-

journment is because a party's pleader wishes to appear on the date fixed in a case in another Court. No hard and fast rules can be laid down in such matters. There are instances in which an adjournment should be reasonably granted to suit convenience alone. For example an application for an adjournment on the ground that the father of the principal witness had died and the witness had to attend his obsequies is a reasonable application, which should be allowed. When a pleader finds that two cases in which he is solely engaged have been fixed in different courts for the same day, one Court would ordinarily grant an adjournment. At present, however, not only are such adjournments granted too freely. The interests of the other side are not sufficiently considered. When a party wants an adjournment to suit his own convenience the court should insist as a preliminary that he pays the costs of the other side for that day. Such adjournments should not be granted except for really good cause. Presiding officers must be stricter on the point, and be ready to give up a reputation for easy going good nature in the interests of efficiency. Lawyers who take up more work than they can handle must be shown that the court will not delay decision to suit their convenience. They can, as is the practice in England when their work increases beyond a certain point, insist on having a junior with them or transfer their briefs. What is even more remarkable is the view which has become almost universal that the court's own convenience is " sufficient cause " for an adjournment. This laxity must stop, and cease entirely. The principle must be accepted as absolute that a case must be taken up on the date fixed unless there is really good reason for an adjournment.

Judgments.

14. Delivery of judgment is frequently delayed sometimes for an unconscionable period. As the law stands, it is almost impossible for a subordinate judge (at any rate in a suit of difficulty) to deliver judgment, as soon as the arguments are completed. He has usually to write out the judgment with his own hand. The assistance of stenographers has been granted in some provinces to district judges, but, such assistance has only been granted to subordinate judges and munsifs in the province of Madras. So the judgment can hardly be expected in a difficult case until at least a fortnight after the arguments have been heard. Naturally the longer the delivery is delayed the less valuable is the decision likely to be. Occasionally the delay is almost scandalous. We have found instances where judgments have not been delivered until a year after the arguments have been heard.

All presiding officers should be given the services of stenographers to whom they can dictate their judgments. The extra expenditure will be more than saved by increased outturn. Further, in all provinces, where it is not already the practice, a monthly return should be sent up of all suits and appeals in which

judgments have not been delivered within a month of the final hearing of arguments.

Judgments of courts other than courts of Small Causes must contain under the provisions of Order XX, rule 4 " a concise statement of the case, the points for determination, the decision thereon, and the reasons for the decision."

A judgment should set forth the evidence on each issue sufficiently to show what was its nature, what it proposes to establish, and what is its credibility, should apply the law, and show the reasons for the final conclusions. It is not necessary that an abstract should be given of the evidence of every witness, and the reasons should not be laboured. While the judgment in itself should make the whole case comprehensible, it cannot obviously be accepted as a substitute for the record. While it should assist the appellate court, if an appeal is filed, it should not attempt to relieve the appellate court of any portion of its duties.

Judgments in India are usually too long, and too laboured. The tendency is not to be satisfied with being convincing, but to be exhaustive. This tendency has been strengthened by the habit of some presiding officers of appellate courts to expect too much from the judgment. Criticism is sometimes levelled too freely at supposed omissions. Subordinate judges and munsifs have undoubtedly become sensitive on this point, and take refuge in excessive caution. The result is expenditure of unnecessary time and energy.

No exact instructions can be given, as to how a judgment should be prepared. The judge's individuality must be given free scope. But it is desirable that some principles should be laid down administratively, and that those principles should be accepted consistently by the officers writing the judgments and the presiding officers of appellate courts. In one particular a reform can be effected immediately. The rule requiring a judgment to contain a concise statement of the case is misunderstood in many courts. All that it requires is that the case should be stated in a few words so as to bring out its nature. The details of contest are found in the issues. But the tendency in places is to be over elaborate.

The misapprehension can be illustrated by a typical example. A Hindu wife instituted a suit in the Court of a subordinate judge for maintenance against her husband. The case could have been concisely stated as follows:—" The plaintiff, who is admittedly the wife of the first defendant sues *in forma pauperis* him, his elder wife the third defendant, and his son the second defendant for maintenance and return of her property on the grounds that she had to leave the first defendant's house owing to his cruelty and that he had retained his property. She is already in receipt of a monthly maintenance granted by the Criminal Court. The defence is a denial of the cruelty, a denial that any property of the plaintiff is in possession of the first defendant, an offer to take the plaintiff back, and a plea that the plaintiff in no circumstances can

claim more maintenance than the criminal court has already allowed her." The concise statement of the case in the judgment is over fourteen hundred words, and contains a full abstract of the whole of the pleadings. A simple instruction would remove the misapprehension.

15. There is frequently considerable delay in preparing the decree. The remedies here will be considered in the chapter dealing with office organization.

APPENDIX TO CHAPTER 4.

Note by Mr. Justice Stuart.

I give an example of the unnecessary length of examination in chief and cross-examination which came to my notice in the decision of a first appeal.

The Raja of N, a large landed proprietor, had become involved in domestic disputes. The Local Government had placed his estate under the management of the Court of Wards. He resented their action, and was endeavouring to recover the management. He had consulted many members of the legal profession.

In April 1905 he asked Mr. A. R. a barrister practising in another province to visit him at N and to advise him professionally on certain points. Mr. A. R. went to N accordingly and was consulted by the Raja on three points. The first was what was the best method of recovering the management. The second was whether certain action the Raja had already taken in connection with his domestic troubles was or was not legally valid. The third point was this. The Raja at the time of the interview was contemplating leaving N, taking up his residence in another part of India, and subsequently making a journey outside India. As Mr. A. R. had already made this journey, the Raja consulted him as to arrangements, and requested him to draw up a plan of travel. The interview on this subject completed, Mr. A. R. returned home.

In May 1905 the Raja left N and went to B where he stayed for several months. In June 1905 Mr. A. R. went to B and was again consulted by the Raja, mainly as to the best method of recovering the management. Mr. A. R. then returned home. He came again to B in August for further consultation in connection with the recovery of the management. He stayed only a short time. He returned again to B in October and stayed on that occasion over October, November, December 1905 and January 1906.

The Raja had determined to make a will of an elaborate nature. Mr. A. R. was instructed to prepare a draft of this will. He prepared a draft, which the Raja accepted in part. He corrected it in places. A new draft was prepared which the Raja accepted. A fair draft was prepared. The Raja made additions, and finally signed and executed the document as his will in the presence of witnesses. The will was subsequently registered, and handed over for safe custody to an officer of the Registration Department in B. All these transactions took place in B. Mr. A. R. then returned home. The Raja shortly afterwards proceeded on the journey which he had contemplated. He died in the beginning of 1907.

After his death suits were instituted, in which the validity of the will was questioned. The parties contesting the validity of the will put the other parties to proof of its execution and regularity, and set up that its execution (if any) had been obtained by undue

influence, and that the Raja was not of sound disposing mind at the time. Contest as to execution and regularity was of little avail. Upon the facts, as they were brought out, there could be no reasonable doubt as to the facts that the will had been executed by the Raja, attested by witnesses who were present at the time of execution, and registered. Contest in respect of undue influence and the disposing capacity of the Raja was not unreasonable in the circumstances of the case.

Mr. A. R. was called by the parties supporting the will to prove its execution and registration, to prove that there had been no undue influence, and that the Raja was of sound disposing mind. There was a mass of other evidence as to execution and registration, and as to the reply that the Raja was of sound disposing mind.

Mr. A. R.'s evidence supported the contentions of the parties who called him. A counsel conducting the case with reasonable expedition would have taken his evidence in respect of execution and registration very shortly and would not have examined him at great length upon other points. He would have brought out that Mr. A. R.'s relations with the Raja were professional, that the Raja understood what he was doing, and that the will was the result of the exercise of the volition of an intelligent man who, as far as Mr. A. R. knew, was not influenced unduly by any one.

In cross-examination most counsel would hardly have touched on execution and registration, as there was no hope of breaking down the case there, and would have concentrated on an endeavour to show from the witness that the disposition of the property was so eccentric as to support the plea of undue influence, and to extract from Mr. A. R. whatever could be extracted in support of the theory that the Raja was not of sound disposing mind.

The examination-in-chief conducted, as it should have been conducted, should have lasted something less than a day, and the cross-examination at the outside should not have lasted more than one day. Mr. A. R. was examined-in-chief for four days and cross-examined for fifteen days.

His examination-in-chief was prolonged unnecessarily, and he was taken into many points which were irrelevant to the decision of the questions before the court. He was asked as to the subjects which he discussed with the Raja at N during his visit to N in April 1905, that is to say, the best method of recovering the management of the estate, the validity of certain transactions into which the Raja had already entered in respect of his domestic affairs, and the arrangements to be made for the Raja's contemplated journey. The first and third points were absolutely irrelevant. Nothing turned on the action of the Local Government. The Court of Wards was still managing the estate, and the Raja was dead. There was nothing improper in the Raja consulting any one he wished, as to the best method of performing a journey, and there was one point here on which the Raja might not unreasonably have wished to have the opinion of a lawyer. This point was whether the Local

Government could prevent his taking this journey. In regard to the second matter, it is true that the validity of the Raja's action taken before he met the witness, and as to which he consulted him, was before the court, but apart from the fact that the discussion between the Raja and the witness in this matter was between client and counsel, the Raja's statement of the case to Mr. A. R. was inadmissible under section 21 of the Evidence Act, and Mr. A R.'s opinion as to whether the action was or was not valid was also inadmissible. It was for the Court to decide whether this action was or was not valid. The only point on which Mr. A. R. should have been examined was as to the execution of the will and his examination on that point should not have taken a full day.

The cross-examination displayed pertinacity to ascertain facts which could not in any way affect the decision of the court. The whole of the first day was spent in cross-examining the witness as to his income and professional position. There was no room for doubt as to the fact that the witness was a barrister in good practice. Nothing was gained by an attempt to shake him on this point. He was next cross-examined as to his acquaintance with another barrister who had advised the Raja on a previous occasion. There may have been an idea here to show conspiracy between these two professional gentlemen, but the cross-examination established nothing of that nature. Mr. A. R. was then cross-examined as to the reason why the Raja had chosen to consult him. As on the facts the Raja in the course of his life had consulted a very large number of counsel, there was nothing surprising in the Raja consulting this particular counsel. The remainder of the day was spent in taking the witness closely over the first interview at N. The greater part of the second day was taken up in taking the witness again over every incident in that interview. He was then cross-examined closely as to the advice he had given as to the best method of recovering management of the estate. That finished the second day.

On the third day he was again cross-examined as to the advice he had given as to recovery of management and was asked to support his opinion as to the validity of the domestic arrangements in respect of which he had been consulted by the Raja. He was pressed again on that point next day. Then he was cross-examined as to the advice he had given for the conduct of the journey. On the fifth day he was cross-examined further as to this advice, and then taken back to general details of the first visit. Amongst other questions he was asked what fee he had charged for his services during that visit. Five days thus went in cross-examining the witness in regard to his first visit to N which was connected with matters not relevant to the case.

On the sixth day he was cross-examined as to the position in which he stood towards the Raja when he visited him at B, and what part he had taken in receiving and disbursing money for the Raja. The seventh day was devoted to ascertaining further what his position was in the Raja's house-hold during his first visit to B. He was cross-examined as to what his relations were with other

witnesses, as to what he knew as to quarrels between other witnesses, and he was questioned very closely in respect of a religious ceremony which had taken place in the Raja's house in B. The eighth day went in cross-examining him as to what further assistance he gave during his first visit to B to the Raja in the arrangements for the journey, and he was taken back to a letter in regard to the Court of Wards management of the estate. The cross-examination of these three days was apparently intended to show that the witness was not acting as a legal adviser to the Raja, but in a secretarial capacity, and that he was exploiting the Raja. Nothing was elicited to show that the witness had acted in any way improperly. It is difficult to see what bearing this had upon the validity of the will.

From the ninth day onwards he was cross-examined as to the events relating to execution of the will from his first instructions to its final completion. The elaborate cross-examination on the point succeeded in eliciting a fact damaging to the cross-examining party. It was this. It came out that the Raja had never intended originally to employ the witness to draft the will, but had intended to employ a senior barrister in the matter. The senior barrister being unable to come to B, the witness had been entrusted with the preparation of the draft. The cross-examination for seven days upon the point of the will was absolutely without result. It was remarkable for its prolixity. Wherever the Raja had written a line, the witness was called on to prove his hand writing. Two days went on such points alone. He was cross-examined for one day as to the reasonableness of certain conditions in the will. It was suggested to him very strongly that it was his duty to guide the Raja's dispositions. What it was hoped to gain by some of the questions it is difficult to understand. The witness was asked, for example, why did not the Raja employ legal advisers of B to draft the will? Further, it had happened that when the will was eventually closed, sealed, and handed over to the Registration Officer, the Raja had himself affixed the seal. The witness was asked why did the Raja affix the seal, and why did not the witness affix the seal? It was on the last day only that the witness was cross-examined as to the Raja's disposing capacity. The questions asked on the point were ineffective and easily answered.

Undoubtedly the witness was a witness who should have been cross-examined. His cross-examination should have lasted at the most for one day. The result of the fifteen days devoted to the purpose was that the evidence of the witness emerged unscathed.

I append an extract from my judgment in the appeals in question. I have altered it so as to refer to the persons concerned by initials. From this it will be seen that in these suits there were instances of prolixity greater than the one already quoted.

"There are certain matters unconnected with the actual decision of the appeals on which I think it necessary to make some

observations. The first is as to the undue protraction of proceedings. The evidence of the witness Dr. C., taken on commission in B, lasted for fourteen days. The evidence of Captain M, taken on commission in B, lasted for four days. The evidence of Mr. J, taken on commission in B, lasted for twenty-six days. The evidence of I. A. taken on commission, lasted for nineteen days. The evidence taken in court of the witnesses called for Rani K. Z. B. lasted for forty-nine days. The evidence taken in court of the witnesses called for Rani S. B. and S. A. K. lasted for one hundred and forty-eight days. The evidence taken in court of the witnesses for A. H. K. lasted for one hundred and six days. The evidence taken in court of the witnesses called for K. lasted for twenty days.

"The actual proceedings in court commenced on the 4th January 1910 and arguments closed on the 25th October 1911. I have been through all this evidence, and am of the opinion that, if only those witnesses had been examined upon whom the counsel could have reasonably placed reliance, if the counsel had taken the trouble to ascertain the character of the witnesses and the quality of their evidence before they were put in the witness-box, and if the examination-in-chief and cross-examination had been conducted in such a business-like manner as could have been reasonably expected from the counsel who appeared in this case, the proceedings would have taken one-fourth of the time actually spent. I have already adverted on the manner in which the cross-examination was conducted. I do not make any reflection upon the conduct of any individual counsel. It is the system that is to be blamed. It has become traditional in Oudh for cases referring to succession in talukdari property to be conducted upon principles different to those adopted in other cases. The reason for the difference would almost appear to be that, as parties in a taluka case can usually find a large amount of money for the expenses of litigation, the counsel take very little trouble to thwart them in their desire to protract proceedings. But the consequences are disastrous. The administration of justice suffers, cases of genuine litigants cannot be heard, and the time of an officer of the standing and intelligence of the learned subordinate judge who tried this case is taken up for nearly two years in hearing a single case. I do not suggest that any individual counsel who was engaged in this case could have been expected to endeavour to bring about a better state of affairs. As things are, it would be too much to expect any individual counsel to throw his weight on the side of expedition. But the result has been that years have been taken up in the recording of evidence, which was sometimes fabricated and usually immaterial, and that the work has suffered. It is difficult to devise a remedy. The learned subordinate judge did endeavour to impose a time limit upon the parties with regard to the production of their evidence. At an earlier period of this case this Bench was reluctantly compelled to find that he had no right to take that course and to remand the case for the recording of further evidence. It is to be noted that the evidence taken on remand was of even less value than the

evidence which had been recorded before. As the Code of Civil Procedure stands, the courts are powerless to prevent such waste of time. They have to hear the evidence, they have to record it. After it has been heard and recorded, it is open to them to enjoy the empty satisfaction of commenting on its worthlessness."

If space were available, I would give numerous other instances in my own experience of similar prolixity not only in talukdari cases.

CHAPTER 5.

Hearing of contested suits continued. Other causes of delay. Delay in serving processes during hearing. Cases held up by other cases. Interlocutory appeals. Bringing parties on record. Commissions. Arbitrations. Miscellaneous matters.

1. So far only those causes of delay have been considered that are within the control of presiding officers during the hearing of a contested suit. There remain causes of delay which are entirely or almost entirely outside the control of these officers.

2. There is a group of causes of delay arising from the somewhat cumbrous provisions of certain branches of the law. These causes will be discussed in other places, where amendments will be suggested.

Serving processes during hearing.

3. The difficulty in serving summons initially has already been treated and will be discussed again. There remains the question of the service of notices which arise during the hearing of a contested case. It frequently happens that even when the parties are before the court it is necessary to serve them in respect of matters which arise during the hearing of the suit. Applications for the appointment of a receiver, for an interlocutory injunction and the like necessitate special notices. The practice of the courts in respect to serving these notices is marked by want of initiative and should be altered. The usual practice is to serve the parties again through the agency of process-servers. This is quite unnecessary, if the system of "registered addresses" and other remedies described in Chapter 10 be adopted.

Cases held up by other cases.

4. Another cause of delay arises, when proceedings are held up by awaiting decisions in other courts caused either by the same subject-matter being under decision or by the filing of applications and appeals in interlocutory matters. In Bihar and Orissa in 1922, 221 out of 433 suits pending for more than a year in munsifs' courts were being held up to await the disposal of one appeal in the High Court. Delay in the disposal of such connected matters is sometimes unavoidable, but it can always be reduced by efforts being made to give priority to the decision of matters which are holding back the decision of other suits. Sufficient efforts are not made at present to attain this object.

Awaiting decision in interlocutory matters.

5. The next cause is delay in deciding certain interlocutory matters. A very large number of such applications and appeals are filed without sufficient cause. Such applications and appeals are

filed sometimes under a genuine apprehension that the presiding officer is not treating fairly the party complaining. These apprehensions when genuine are not always reasonable. The attitude of the parties and the Bar towards presiding officers of district courts is too often one of unfounded suspicion. Further, in the district courts the members of the Bar are apt to resent any thing that makes for strictness. As a result, attempts made by the presiding officers to take a justifiably strong line are met in many instances by an application for transfer of the suit to another court.

We are of opinion that the work of presiding officers of subordinate courts in the larger provinces in particular is sufficiently good to justify their being given a free hand in the control of their own work. The figures of the results of appeals in the more important suits which came on first appeal to the High Courts or Judicial Commissioners indicate that the work of subordinate judges is of high quality. It is carefully tested during the hearing of such appeals, for not only are the merits of the decision discussed, but the conduct of the case is also subjected to a searching criticism. Every point is examined and every error is exposed. Nevertheless nearly seven out of ten of their decisions are confirmed both on law and facts.

Nor is the work of the courts below these courts appreciably inferior. More than six out of ten of their decisions are confirmed.

But in addition to such applications or appeals as are filed under a genuine though mistaken apprehension, there are applications and appeals which are not genuine or even honest. There are many litigants all the world over who do not use fair methods. It is by no means uncommon for a party in India, who finds his case not progressing as he would wish, to fight for time which he desires in order to fabricate false evidence.

Such a person, after he has exhausted the ordinary adjournments, is apt to file an application or an interlocutory appeal simply to gain time. He has not the slightest hope that he will succeed—in fact, he does not wish to succeed. He gains his object if the application or the appeal is admitted, for then the extension of time necessary for his purpose follows as a matter of course.

Such applications and appeals are of course decided fairly and on merits. There may be a tendency here and there to be too sympathetic towards the objector and to accept his allegations at their face value. There is certainly a tendency to give something less than his due to the presiding officer who has passed the order. But these are minor matters. The major matter is the waste of time between the admission and the decision of the application or the appeal which is doomed to eventual failure. The remedy would appear to lie in a closer scrutiny before admission based on the broad principle that a responsible officer should be allowed a free hand in all matters other than those of vital importance, and in the giving of priority of hearing to such applications and appeals.

Guardians ad litem.

6. There is further great difficulty in suits, in which a defendant is a minor. In such a suit the court must appoint a guardian for the suit. While it is essential that the interests of a minor should be safeguarded, precautions should be taken to prevent abuse of this provision. In many suits it is to the interest of the defendant to protract proceedings. A common instance of such a suit is a suit for redemption of a mortgage. When a mortgagee or one of the mortgagees is a minor, the following simple device is frequently adopted to delay decision. The plaintiff applies for an order for the appointment of a guardian, naming a near relation—possibly the minor's own father—. The proposed guardian, who is the person who should be appointed, refuses to act. Under Order XXXII, rule 4, no person can without his consent be appointed as guardian for the suit. The plaintiff then has to think of another relation. He applies for his appointment. That relation also refuses. The process has to be repeated, for under Order XXXII, rule 4, it is only " where there is no other person fit and willing to act as guardian for the suit," that the court is permitted to appoint one of its own officers as guardian. Finally after several applications have been made, and several persons have refused, the court appoints one of its own officers as guardian, and the suit proceeds.

We have found many instances in which it has taken more than a year to appoint a guardian to the suit. In one instance proceedings were held up for two years, before the guardian was appointed.

7. We consider that Order XXXII, rule 4, should be remodelled. This rule combines directions as to the appointment of a next friend of a minor who is plaintiff and a guardian *ad litem* of a minor when he is defendant. The combination of directions in the same rule is not altogether happy. The object of appointing a next friend to a plaintiff who is a minor is in the main not to secure the interests of the minor, but the interests of the defendant by requiring that there should be with the minor some person who will be responsible to the defendant for his costs in the event of failure of the action. The appointment of a guardian *ad litem* to a minor as a defendant is to protect the interests of the minor in the suit.

The rule commences with " where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be." This provision does not require amendment. In such a case the guardian appointed by the court is obviously the proper person to represent the minor.

In event of there being no such person, the rule should lay down that the natural guardian of the minor, or, where there is no such guardian, the person in whose care the minor is should ordinarily be appointed guardian for the suit. As the rule stands, neither a guardian appointed by competent authority nor a natural guardian nor the person, in whose care the minor is, can be appointed guardian for the suit without his express consent. The framers of the new Code inserted this provision in place of the old provision whereby such consent was presumed. We see no advantage in the alteration, and would revert to the old practice which has been approved by many witnesses, who had considered the point. Such a person cannot, of course, be appointed as guardian for the suit, if he refuses to accept the responsibility. To force such a person to act, when he refuses to accept the responsibility, would be detrimental to the interests of the minor. We propose therefore that the consent of such a person should be presumed, and that notice should be issued upon him presuming his consent. There is no object in issuing notice upon the minor. We suggest that, if such a person does not within a month refuse to act his consent should be presumed. Should he eventually appear before the court and refuse to act, the court would then relieve him of his duties and would appoint another guardian for the suit. In no circumstances would the court appoint such a person if it considered, for reasons to be recorded, that it was for the minor's welfare that another person should be appointed. The main reason for refusing to appoint such a person would be that his interest was adverse to that of the minor, or that he was not in other respects a suitable guardian.

If such a person be not appointed, we suggest that the court should immediately appoint one of its own officers as guardian, unless the presiding officer, from his own knowledge or information received, can discover a relative, near friend or other person, who would be the most suitable guardian. We would make it clear in the rule that a pleader of the court is an officer of the court for this purpose. In many instances the most suitable guardian of a minor would be a pleader of the court, especially if a pleader of standing could be found who was engaged mainly in chamber work, and who would have sufficient time to devote towards such duties. The consent of an officer of the court other than a pleader can be easily arranged, but, when a person other than a paid officer of the court is appointed, his express consent should be first required. But if a person other than a guardian appointed by competent authority, a natural guardian or the person in whose custody the minor is, is appointed as a guardian, the costs to be incurred by him in the performance of his duties as a guardian must be borne either by the parties or one or more of the parties to the suit, or out of any fund in court in which the minor is interested. When the costs are borne by a party it will be unusual for them to be borne by a party other than the plaintiff or one of the plaintiffs.

Commissions.

8. Delay arises frequently when commissions are issued to examine witnesses, for local investigations, to examine accounts, or to make partitions.

Commissions to examine witnesses may be issued to examine a witness who is resident within the local jurisdiction of the court when such a person is exempted from attendance, or is from sickness or infirmity unable to attend the court (Order XXVI, rule 1), or is about to leave the jurisdiction before the date fixed for examination in court, or is an officer of Government who cannot attend without detriment to the public service (Order XXVI, rule 4).

Such commissions are issued mainly for the examination as witnesses of parda-nashin ladies. There should not be delay in returning them, for the commissioner in these instances is usually a pleader of the court, and under the court's control. Nevertheless there is too often great delay in executing these commissions, and the time expended over the examination and cross examination of the witnesses is unduly protracted.

The delay is very much greater in the case of commissions issued for the examination of witnesses resident beyond the local limits of the court's jurisdiction. As no one can be ordered to attend in person who resides more than two hundred miles from the Court House (Order XVI, rule 19) it is almost obligatory to issue commissions for the examination of outside witnesses under Order XXVI, rule 4, and very serious delays arise in awaiting the return of such commissions. They are issued to the court within the local limits of whose jurisdiction the witness resides, or to a pleader or other person whom the court issuing the commission may appoint.

As there is a disinclination to add to the duties of courts the recording of evidence in suits not within their jurisdiction, the usual practice is to appoint a pleader in the place where the witness resides as commissioner. Lists of pleaders in all courts who are ready to accept commissions are maintained, and the issuing court usually selects the name of one, and sends him the papers and the fee.

There is delay in returning these commissions. The delay is sometimes very marked. The pleaders to whom they are issued are apt to put them on one side and to take them up when they have nothing better to do. The fees paid are small, and present little attraction. As these pleaders are unknown to the issuing court, and not under that court's control, the presiding officer can do little to expedite return.

The system under which pleaders are appointed commissioners is not a bad system. There is no advantage in taking up the time of presiding officers in recording evidence on commission

But the control over the commissioner should be effective. We suggest that in substitution of the present system under which a large number of pleaders are entered as commissioners in each place only one or two selected men should be kept on the list. The scale of fees should be revised, and the conditions improved. The work would then be more lucrative. It should not be difficult to find suitable men. At all headquarters there are some pleaders who although quite competent to undertake such duties, have little practice in the courts.

9. Under the Evidence Act the word " Court " includes all judges and magistrates and all persons except arbitrators legally authorized to take evidence. It therefore includes commissioners appointed to take evidence under the Civil Procedure Code, and such commissioners must act in conformity with the provisions of the Act. Although it would appear that a commissioner has the authority given by Chapter X of the Evidence Act to exclude irrelevant or inadmissible evidence, and to see that the provisions of Section 138 are obeyed in respect of examination, cross-examination and re-examination, and has further the authority to prohibit the putting of leading questions and to forbid questions which are prohibited under the provisions of Sections 151 and 152, the Code does not make the position of such a commissioner clear upon these points, and in consequence there is considerable uncertainty both in the minds of certain presiding officers and commissioners as to what the powers of the latter really are. In our opinion the rules should be recast in order to make clear that a commissioner can have the same authority as a judge in these matters. Not only is there a considerable waste of time in the recording of evidence upon commission, but witnesses are exposed to considerable inconvenience and sometimes to improper treatment owing to the fact that the majority of commissioners are under the impression that they have no authority to control the examination.

Instances can arise in which it is not possible to obtain the services of a commissioner who is qualified to be given discretion to exclude inadmissible evidence. To provide for such a contingency, we consider that the rules should be recast in order to provide for the appointment either of a commissioner who shall have the same authority as the court in excluding inadmissible evidence, or for the appointment of a commissioner who would be obliged to record every thing that each party desired, leaving the question of admissibility or inadmissibility to the decision of the court which issued the commission. In cases in which a commissioner is given full power to reject evidence as inadmissible the rule should provide for an appeal against his decision refusing to admit to the court which issued the commission. Such an appeal should be filed within a very short period. We would not be in favour of permitting such an appeal to be filed more than seven days from the date when the party objecting has had the opportunity of approaching the court after rejection.

It is obvious that, if commissioners are to give satisfaction in the discharge of their duties, they must be furnished at any rate with an abstract of the pleadings and the issues to enable them to be in some sort of a position to form an opinion as to what is not material or relevant. There should not, however, be any difficulty in providing commissioners, when necessary, with such materials. Further, it is essential that if the powers of commissioners in this respect are to be exercised so as to give satisfaction, the care which we have already indicated as necessary should be exercised in their selection.

10. Commissions of this nature should be issued to the court within whose jurisdiction the witness resides and not to the pleader. The court should issue the commission to the pleader noting the date, should note the progress of the work, and be held responsible for due execution.

There is no objection to the parties sending a commissioner from the district in which the suit is being heard to record the evidence of a witness in a district outside the court's jurisdiction.

11. Commissions for local investigations such as ascertaining the market value of property in dispute, the ascertainment of mesne profits, damages, or annual profits, surveying, ascertaining boundaries, or for making partitions are in some places made over to officers on fixed salaries called "amins" (the fees being credited to the Government) and in other places to pleaders who are remunerated by fees. When these commissions are issued to amins delays should and can be reduced to a minimum. The amin is a court officer, and can be made to work expeditiously if properly supervised. When these commissions are issued to pleaders the delays are sometimes very great. Not only are the commissioners not so easy to control, but the system itself makes for delay. In order to execute such a commission, the commissioner has usually to leave headquarters and remain away some little time. He naturally is apt to subordinate this duty to his other engagements.

The amin system, as it exists at present, has, however, been criticized unfavourably. The amin is not always above suspicion. The system has been given up in many places owing to the unsatisfactory work done by the amins in the past in those localities. But this circumstance does not appear to us to constitute a real objection to the system. It is only an objection to the manner in which it has been worked. Amins are selected from the ministerial staff. They are poorly paid and poorly qualified. Their work on the whole is better than might be reasonably expected. If, as we suggest they should be, they were selected from a superior class, better trained, better paid and better supervised, there is no reason why their work should not be absolutely satisfactory.

In the province of Bengal and elsewhere, where the amin system has been given up, certain pleaders have gone through special courses in survey and the like, in order to render themselves com-

petent to carry out such commissions. Where such pleaders have undergone this training and have proved their efficiency, we do not suggest that the present system should be altered, although, even where the pleaders are efficient, they cannot necessarily be under the same control as amins, or able to act as promptly. Our recommendations here are that, where the amin system is in existence, it should be retained, but that the amins should be better trained and better supervised. Where the amin system is not in existence, it will be open to the provinces concerned to introduce it, unless they have a satisfactory system already in existence of issuing commissions to amins.

12. There remain commissions to examine accounts. There is considerable delay in obtaining their return. If, however, the court takes the trouble to find individuals each competent in a particular form of accounts, to arrange with them always to undertake the commissions to examine such accounts, and to remunerate them adequately for the work performed, the delays will be very much less.

Arbitration.

13. Changes in the law of arbitration in suits will be considered elsewhere. Here attention is drawn to the fact that once a suit has been referred to arbitration, it is apt to drag on unduly. The remedy is, however, very hard to find. It is for the parties to appoint their own arbitrators, and when they select men of unmethodical habits, the work will not be done in a methodical manner. Arbitrators further find greater difficulties in procuring the attendance of witnesses and the production of documents than are experienced by courts. They cannot be as strict as a court. We have, however, observed that where the presiding officer of the court is zealous and tactful he can influence the speed of the disposal of the work by arbitrators, and it is from greater care and attention from the presiding officer that improvement can be expected.

Results.

14. The extent to which the decision of contested suits is delayed by causes outside the control of presiding officers may be apprehended partially from the result of an examination made of the causes of delay in regular suits which were pending for more than a year on the 30th September 1923 in the courts of district judges, subordinate judges and munsifs in the province of Agra. There were 709 such suits. Failure to effect service accounted for 42, the stay of proceedings to await the result of proceedings in other courts accounted for 89, delays caused by commissioners in not carrying out their duties accounted for 31 and the delays caused by arbitrators who failed to return their awards accounted for 33. Thus 195 suits out of 709, more than one-fourth of the suits pending for a year were held up owing to causes not within the control of presiding officers.

We have not considered so far the disposal of judicial and non-judicial miscellaneous work. It is not necessary to enlarge on this point. Where miscellaneous work is of a judicial nature the same defects are present as in the disposal of suits, and the same remarks apply. Where it is non-judicial the subject will be treated under the head of office work.

CHAPTER 6.

Instances of delay in original suits.

Some examples taken from different provinces will indicate in detail the nature of some of these delays. These cases have been selected not as the worst cases, but as typical cases from certain provinces. The names of the parties are not given, nor have the names of the provinces in which these suits arose been indicated.

CASE I.

H. B. *v* M. N. C.

This suit was instituted on the 2nd June 1919 in the court of a subordinate judge. The plaintiff alleged that M. N. C. defendant, had executed a promissory note in favour of H. B. plaintiff, for Rs. 5,500 carrying 15 per cent. simple interest, that certain repayments had been made, and that after deducting these repayments Rs. 5,759 were due. The suit was to recover that sum. The written statement was filed on the 27th August 1919. It was over three thousand words in length. Much was irrelevant; the mass was argumentative. The written statement admitted execution of the promissory note by the defendant. It set forth the defendant's version of the monetary transactions between the parties for many years. The main contests taken by the defendant were that no consideration in cash had passed at the time of execution of the promissory note in suit and that the payments made satisfied the amount due. It further pleaded that the note had been executed as a result of undue influence exercised by the plaintiff over the defendant and that the rate of interest was unconscionable.

The plaintiff's case was that Rs. 4,665 out of the consideration had been handed back in satisfaction of the amount due under two previous promissory notes, that the balance Rs. 835 had been taken by the defendant in cash, that only those payments had been received which were set forth in the plaint, that no undue influence had been exercised and that the rate of interest was not unconscionable.

The plaintiff was a banker in a well established business. The defendant was a zamindar, who engaged in money lending and trade. Both parties produced books of accounts kept in a regular way of business.

The 16th May 1920 was fixed for the final disposal of the suit. On that date the plaintiff was ready with his evidence. The suit was not taken up on that date, but adjourned to the following day. On the following day the defendant filed an application calling upon the plaintiff to produce the books of account of the branch in which the transactions had taken place for the past six years. The plaintiff objected to producing these

books. He was subsequently ordered to produce such books as contained references to the monetary transactions between the parties. On the 28th June 1920 the defendant applied to examine the plaintiff on interrogatories. After some contest the application was granted. The interrogatories were answered on the 12th August 1920.

The issues were not framed till the 17th June 1921 and the 1st July 1921. On the 4th July 1921 the defendant applied for permission to amend his written statement.

On the 25th July 1921 (more than two years after institution) the hearing of evidence commenced. The plaintiff's first witness K. R. was his employee. K. R. had arranged for execution of the promissory note in suit and seen the defendant receive the consideration. He was examined for a portion of the 25th July. The examination-in-chief concluded early on the 26th July; he was cross-examined for the remainder of the 26th July and for the greater part of the 27th July. He was re-examined on the 27th July. After his re-examination was concluded the court permitted him to be cross-examined further. This further cross-examination continued on the 28th July. The witness was in the box for nearly three days. His examination, cross-examination and re-examination should have been concluded in two hours.

In cross-examination he was asked to disclose the names of all the employees of the branch during the last six years and to state what their duties were. He was asked to give a complete account of the methods of conducting business in the branch. He was asked who the relatives of the defendant were, and what he knew of their monetary transactions. He was asked to give a minute account of the whole of the defendant's transactions with the plaintiff for six years. He was taken over every detail of the execution of the promissory note in suit and over a very large number of entries in the plaintiff's books, which he had not made, in respect not only of the defendant's transactions with the plaintiff but of other transactions. Nothing was elicited in favour of the defendant from this cross-examination. There was no need for re-examination. There was nothing in re-examination which justified further cross-examination.

On the 28th July 1921 H. J. plaintiff's second witness entered the box. H. J. was cashier of the branch and had written up relevant entries in the account books. He gave details as to the execution of the promissory note and proved the entries in the account books which he had made. He was examined-in-chief at an unnecessary length for the greater part of the remainder of the day. His cross-examination commenced just before the court rose. He was cross-examined for the whole of the 29th July and 30th July. The court did not sit on the 31st July and the 1st August. On the 2nd August his cross-examination concluded. He was then re-examined and cross-examined on his re-examination. He was in the box for over three days.

This witness was cross-examined on the same lines as those on which the first witness had been cross-examined. His cross-examination was even less valuable than that of the previous witness. There was no necessity to re-examine him and nothing arose in re-examination which required cross-examination. His evidence should have taken about three hours.

Three more witnesses S. B. S., R. K. S., and K. D. were examined on behalf of the plaintiff on the 2nd August 1921. They were persons who had had monetary transactions with the plaintiff's branch and were called to prove that he conducted his business in a regular manner. Their evidence added nothing to the case. This closed the plaintiff's case.

The defendant's evidence commenced on the 3rd August 1921. He put himself in the box as first witness for the defence. He was examined-in-chief for the whole of the 3rd August and for a greater part of the 4th August. In his examination-in-chief he gave details as to the history of his ancestors. He was taken in the minutest details over all the transactions which according to him led to the execution of the promissory note in suit. He finally deposed at length how the promissory note in suit came to be executed. He was further examined as to repayments and as to the undue influence alleged to have been exercised over him and as to the rate of interest.

His cross-examination commenced on the 4th August and continued for the 5th, 6th, 8th and 9th. He was cross-examined in all for four and a half days. He was re-examined on the 9th August, and cross-examined on his re-examination for the remainder of that day with the exception of the last quarter of an hour. He was thus in the witness box for practically six days. His cross-examination was of value but should have been compressed into less than one-fifth of the time it actually took. This witness's evidence on a liberal estimate should have taken one day.

N. N. C. second witness for the defendant was examined-in-chief for about quarter of an hour on the 9th August. His evidence was concluded on the following day. He was called to prove that he would have been ready to lend money to the defendant at a lower rate of interest than the plaintiff had charged on the promissory note in suit. He added that he did not know the defendant and had never been asked to lend money. His evidence was irrelevant.

On the 10th August the evidence of S. M. defendant's third witness was commenced. S. M. was defendant's servant. He was examined-in-chief for the remainder of the 10th August and for half of the 11th August. He was cross-examined for the remainder of the 11th August and for the whole of the 12th August (there was a short sitting that day) and a portion of the 13th August. This witness was called to corroborate the defendant as to the nature of the transaction and repayments. Both his examination-in-chief and his cross-examination were unnecessarily protracted.

The cross-examination was of value but it lasted much too long. One day was more than sufficient for the whole of this witness's evidence. The defendant's fourth witness P. B. called in corroboration was heard on the 13th August. This closed the defendant's case.

Nine witnesses in all were heard. Three were unnecessary. One gave irrelevant evidence. The plaintiff's evidence should have occupied one day and the defendant's evidence should have occupied two and a half days.

The judgment was delivered on the 24th August 1921 decreeing the plaintiff's suit.

This was a simple suit on a promissory note. The facts were in no way complicated, and no question of law worth the name arose. The plaintiff was a banker in well established business who conducted his business regularly and kept proper books of account. The defendant was a middle aged zamindar, who conducted money lending and trading transactions. He admitted having executed the promissory note. The plaintiff's books showed that the greater portion of the consideration had been devoted to the satisfaction of amounts due on previous transactions and that the balance had been paid in cash. They showed certain repayments. Nevertheless the suit took nearly two and a quarter years to decide, and the hearing of evidence occupied sixteen working days.

Case II.

P. B. and ors. *v.* B. & Co.

A company owning a mill represented by the defendant company B. & Co., purchased about 1919 a plot of land adjoining the mill from B. L. P., for the purpose of extending their premises. The plot of land was less than two acres in area. In 1920, P. B. and three others, zamindars of the village in which the plot was situated, instituted a suit in the court of the subordinate judge against B. & Co., on the allegation that B. L. P. the defendant company's vendor was a tenant without right of transfer, to eject the defendant company from the plot, and in the alternative to prohibit them from making constructions on the land or using it for other than agricultural purposes. The plaint was presented on the 31st May 1920 and on the same day an application was made for a temporary injunction supported by an affidavit. This application asserted that the defendant company was converting the land in suit into a burning ghat, and asked for a temporary injunction to be extended for the period that the suit was in progress, to restrain the company from converting the land into a burning ghat or making any constructions thereon. The following is a complete history of the progress of the suit as contained in the

order sheet. The numbers of the orders are the numbers given in the order sheet. The notes are our notes:—

No. of order.	Date of order.	Order.	Note.
1	31st May 1920 .	Plaint filed. To 1st July 1920 for settlement of issues.	
2	Ditto .	Plaintiffs applied for temporary injunction to restrain defendant company building on land in suit. The application was accompanied by an affidavit. *Order.* Temporary injunction granted ex-parte prohibiting defendant company "making the disputed land into burning ghat or erecting any sort of pacca structure thereon." Notice to defendant to show cause against the grant of an injunction within seven days.	The affidavit disclosed no sufficient cause justifying the granting ex-parte of a temporary injunction.
3	9th June 1920 .	The defendant company appeared by pleader, admitted having received notice of the temporary injunction on 3rd June 1920 at the office of their solicitors, filed a power of attorney dated 4th June 1920 empowering the same solicitors to represent them, and put in an application stating that, having regard to the nature of the case and the fact that notice had only been served on them on the 3rd June, they should be allowed an extension of time within which to show cause against the temporary injunction. *Order.* Three weeks extension allowed.	
4	29th June 1920.	Defendant company applies for further time to file objections to the injunction. To be put up later.	Orders were passed on 1st July 1920— *See* Order 6 *infra*.
5	1st July 1920 .	"On the application of the plaintiffs for time for service of summons on the defendant the suit is adjourned to 28th July next for settlement of issues.	The plaintiffs had been allowed one month within which to serve the summons with copy of the plaint on the

No. of order.	Date of order.	Order.	Note.
			defendant company. They had served notice of the injunction on them on the 3rd June. The service of the summons with copy of the plaint could have been made at the same time. The plaintiffs, having obtained their temporary injunction, take no action to proceed with the suit, ask for time and get it granted.
6	1st July 1920 (later on the same day).	"Defendant's petition for time to show cause against injunction matter filed on 29th June 1920 is considered. Defendant is allowed to show cause on or before the 28th July next."	This is the order on 4 *supra*. The court having a few hours before adjourned the hearing to 28th July to enable the defendant company to be served with notice of the suit, and a copy of the plaint, now treats the company as present and directs them to show cause on the same day against the injunction.
7	28th July 1920	"Summons upon the defendant returned unexecuted for want of an identifier. On the application of the plaintiffs for time for service of summons upon the defendant, the suit is adjourned to 21st August next for settlement of issues. Issue summons to the defendant as prayed for."	The defendant company have an office in a main street within seven miles or so of the court. They had appeared through a pleader on the 9th June, the 29th June, and the 1st July. They had been served once in the matter of the injunction. They had intimated the names of their solicitors. Yet the court accepted as a reason for their non-service with summons in the original suit, that the plain-

No. of order.	Date of order.	Order.	Note.
			tiffs had omitted to supply an identifier. A few hours after this order was passed, the pleader of the defendant company appears, and puts in an application on which the court passes orders. The summons in the meantime re-issues.
8	28th July 1920 (same date).	The defendant company being present by pleader and having filed an application "that today is fixed for your petitioner to show cause why the injunction prayed for by the defendants should not be granted, that unfortunately your petitioner has not yet been able to collect all the papers and documents necessary for them to show cause, that some more time will be required for the said purpose." *Order.* "On the application of the defendant for time to show cause against injunction matter, they are allowed to show cause on or before 21st August next."	
9, 10 & 11	21st August 1920	Summons served. Defendant asks for further time within which to file written statement. Time granted on defendant company paying costs of day's hearing. Adjourned to 11th September 1920 for framing issues and decision on injunction.	
12	23rd August 1920	Defendant company having paid day's costs allowed a week within which to file written statement.	
13	30th August 1920	Defendant company files affidavit showing cause against injunction. *Order.* To 25th September for hearing rule.	
14	11th September 1920.	Defendant company applies for further time within which to file written statement.	

No. of order.	Date of order.	Order.	Note.
		Order.	
		Time extended for that purpose to 25th September, on which date issues will be framed.	
15	25th September 1920.	Defendant company asks for further time within which to file written statement. Time granted on condition that they paid cost of day's hearing up till 8th October. Rule ordered to be heard on 19th November.	
16	8th November 1920.	Defendant company files written statement. Issues not framed. Adjourned to 19th November for framing issues.	
17	19th November 1920.	Plaintiffs file counter affidavit in the matter of the rule for injunction, and submit the issues they suggest should be framed.	
		Order.	
		Adjourned to the 4th December for framing issues and deciding injunction.	
18	26th November 1920.	Plaintiffs file certain documents.	
19	4th December 1920.	Judge engaged in hearing part heard suit. To 6th January 1921 for framing issues and deciding injunction. Defendant company to submit issues they suggest should be framed on that day.	
20	6th January 1921	Adjourned to 7th January 1921 .	No reason given.
21	7th January 1921.	Adjourned to 20th January 1921. (Reason given " Want of time.")	
22	20th January 1921.	Adjourned to 31st January 1921. (Reason given " No time today.")	
23	31st January 1921.	Adjourned to 19th February 1921. (Reason given " Want of time.")	
24	19th February 1921.	Adjourned to 11th March 1921. (Reason given " Presiding officer is indisposed.")	
25	11th March 1921.	Adjourned to 2nd April 1921. (Reason given " The court is otherwise engaged.")	

No. of order.	Date of order.	Order.	Note.
26	2nd April 1921.	Adiourned to 30th April 1921. (Reason given " By request of pleaders.")	
27	30th April 1921	Adjourned to the 24th May 1921. (Reason given " At the request of pleaders.")	
28 & 29	25th May 1921.	The hearing was taken up on the 25th May as the 24th was a public holiday. Adjourned to the 18th June. (Reason given " At the request of pleaders.")	
30	18th June 1921	Adjourned to the 2nd July 1921. (Reason given " No time today.")	
31	2nd July 1921	Adjourned to the 16th July 1921. (Reason given " At the request of pleaders.")	
32 & 33	16th July 1921.	Issues framed. To 1st August 1921 for evidence. The matter of the injunction was not decided. 6th August 1921 was fixed for its decision. " At the request of pleaders."	
34	6th August 1921	Adjourned to 10th August 1921 for decision of the rule. (Reason given " At the request of pleaders.")	
35	10th August 1921	" On the application of the defendant for time, and the plaintiff consenting" the hearing was adjourned to the 14th September 1921 both for final decision of the suit and decision of the injunction.	
36	14th September 1921.	Adjourned on the application of the plaintiffs to 7th November 1921.	
37	7th November 1921.	Adjourned on the application of the plaintiffs to 22nd November 1921.	
38, 39 & 4	22nd November 1921.	Adjourned on the application of the plaintiffs to 3rd December 1921 for decision of the injunction and to 9th December 1921 for decision of the suit.	
41	5th December 1921.	It having been subsequently discovered that the 3rd December was a holiday, adjourned to 9th December 1921 for decision of the injunction also.	

No. of order.	Date of order.	Order.	Note.
42	9th December 1921.	"On the application of the defendant for time and the court being otherwise engaged" the hearing was adjourned to 6th January 1922 for decision of the suit and injunction.	
43	6th January 1922	On the application of the defendant adjourned to 14th January 1922 for decision of the injunction and to 31st January 1922 for decision of the suit.	
44	14th January 1922.	Adjourned to 24th January 1922 for decision of the injunction. (Reason given "No time today.")	
45 & 46	24th January 1922.	Adjourned to 31st January 1922 for decision of the injunction. (Reason given "The court is otherwise engaged.")	
47	31st January 1922.	"On the application of the defendant for time and the court being otherwise engaged" to 22nd February 1922 for decision of suit and injunction.	
48	22nd February 1922.	"On the application of the plaintiffs for time and the court being otherwise engaged" to 22nd March 1922 for decision of suit and injunction.	
49	22nd March 1922	One witness for plaintiffs present, but not heard. The defendant company asked for an adjournment. Adjourned to 21st April 1922.	
50	21st April 1922.	On the application of the plaintiffs for time the defendant company having no objection, adjourned to 17th May 1922.	
51	17th May 1922.	On the joint application of both parties for time adjourned to 15th June 1922.	
52	15th June 1922.	Parties requesting adjournment in view of negotiations for a settlement adjourned to 13th July 1922.	
53	13th July 1922	Negotiations not completed to 21st July 1922.	
54	21st July 1922.	Negotiations not completed. Adjourned to 18th August 1922.	

No. of order.	Date of order.	Order.	Note.
55	18th August 1922	Negotiations not completed. Adjourned to 12th September 1922.	
56	12th September 1922.	Suit withdrawn and dismissed. Costs on parties.	

It will be seen from the above order sheet that the suit was instituted on the 31st May 1920 and was withdrawn under an amicable settlement on the 12th September 1922. The hearing thus lasted for two years three months and twelve days during which period not a single witness was examined.

The mis-management of the service of summonses was amazing. By the 3rd June 1920 notice of the temporary injunction had been served on the defendant company through their solicitors, and the defendant company had informed the court of the names of the firm of solicitors representing them by the 4th June 1920. The defendant company appeared in court on the 9th June 1920, 29th June 1920, 1st July 1920 and the 28th July 1920. Yet the court was not satisfied that there had been sufficient service on them even on the 28th July 1920, because the summons on the company had been returned unexecuted for want of an identifier, and it was not till the 21st August 1920 that the parties were considered to be before the court. It would hardly have been possible to have discovered a party on whom it was more easy to serve a notice, for the defendant company owned large offices in a frequented thoroughfare within a few miles of the court premises.

The reasons adduced by the defendant company for their inability to reply at once to the application of the interim injunction and for their inability to file a written statement on the date desired were not convincing. A firm of their standing would ordinarily be expected to have their title deeds ready to hand and when advised by a firm of solicitors should not have required more than a week to meet the injunction and three weeks within which to file a written statement.

Yet it is seen that after receiving notice of the issue of the interim injunction on the 3rd June 1920 the defendant company were not ready with an affidavit in reply till the 30th August 1920. Although the application for injunction contained the substance of the plaint and the application was in the defendant company's hands on the 3rd June 1920 (it is true that a copy of the plaint does not seem to have reached the defendant company till the middle of August 1920) the written statement was not prepared till the 5th October 1920.

The issue of an *ex-parte* injunction was not justified in any way. Although the defendant company's contest was unsatis-

factory, the affidavit in support of the application for injunction did not disclose any cause sufficient to justify its being granted. The failure to decide the matter of injunction reflects little credit on the court. Its effect was to stay the defendant company's operations and to interfere with the conduct of their business. In these circumstances the court should have decided the matter promptly.

The methods up to the time of the filing of the written statement were not satisfactory. The methods were even less satisfactory afterwards. The delay in fixing issues was absolutely inexcusable. The points in dispute were clear. It should not have taken more than half an hour to master the pleadings and the framing of issues could have been completed in another half hour. It appears that the presiding officer did not apply his mind to the points, but encouraged the parties to fix their own issues. Although he was ready to transfer his duties in this respect to the parties themselves, it took fourteen adjournments before the issues were fixed and three months and eight days passed before they were framed. The blame for the subsequent waste of time must be apportioned between the judge, the plaintiffs and the defendant company. When one party or the other or both did not obtain an adjournment on insufficient grounds the judge adjourned of his own motion for inadequate reasons, and the hearing dragged on for fourteen months after the issues were framed without recording the evidence of a single witness until finally the suit ended in a compromise. It came before the court on forty-five separate days. The hearing was adjourned on nine occasions, because the court had no time to take the suit up or was otherwise engaged; on seven occasions at the request of the plaintiffs, on seven occasions at the request of the defendant company and on eleven occasions at the request of both the parties. On only six occasions was the adjournment justified.

The decision of the suit should have been a simple matter. It turned only on two points. These were whether the defendant company's vendor had a right to transfer the land in suit and whether in view of the vendor's right, the defendant company had a right to utilize the land as they were utilizing it. The decision would have been mainly upon consideration of the documentary evidence. Properly handled the suit should have been decided with contest in six months or less, and the actual hearing should not have taken more than two days.

Case III.

S. R. and ors. *v.* B. M. and ors.

The plaintiffs were a firm carrying business in grain in an inland town A. The first defendants were a firm carrying business in the same town and also in a sea-port town B in another province. The plaintiffs alleged that they agreed to consign grain

from A to the first defendants in B, and to recover the amount due by drawing hundis on the firm of the second defendants, that they accordingly despatched grain and drew certain hundis, and that in consequence of the first defendants' firm having failed all the hundis were dishonoured. Their case was that after stopping certain goods in transit there was a balance of Rs. 8,000 due from the defendants. They instituted a suit for recovery of this amount with interest on the 2nd November 1907 in the court of the district judge at A.

He transferred the suit for hearing to the subordinate judge on the 6th November 1907. The 9th December 1907 was fixed for the settlement of issues, but the hearing was delayed owing to difficulties in serving summonses. Summonses were finally served. A written statement was filed on the 12th May 1908. As it was found that the plaintiffs had entered the names of two deceased persons only as partners in the firm of the first defendants, the plaint was returned for amendment. On the 1st June 1908 it was returned amended. On the 2nd June 1908 further written statements were filed, and issues were framed on the 5th July 1908. The first issue was whether the court at A had jurisdiction to hear the suit or whether the jurisdiction was of the court at B. The court did not decide this preliminary issue and proceeded with the hearing of evidence. Evidence was recorded on the 14th August 1908. The defendants had obtained permission to examine witnesses on commission by interrogatories, but there was delay in returning the commissions. Further evidence was recorded for the plaintiffs on the 7th Novemb[redacted]08, 9th January 1909 and 23rd January 1909. Evidence [redacted]orded for the defendants on the 17th March 1909, [redacted]9, 22nd April 1909, 11th May 1909 and the 14th M[redacted] subordinate judge was transferred, and as his succes[redacted] jurisdiction to hear the suit, the district judge took the suit back on his own file. He decided on the 18th March 1910 on the preliminary issue that the court in A had no jurisdiction to hear the suit and that it could only be tried in B. He accordingly returned the plaint for presentation to the court in B.

A miscellaneous appeal was forthwith filed against this decision.

This appeal was decided on the 22nd June 1915 five years after institution. It was determined that the court in A had jurisdiction to hear the suit and it was sent back for re-hearing. Another subordinate judge took it up. He recorded additional evidence and finally decreed the suit on the 26th March 1917 for Rs. 8,000 with interest at 6 per cent. An appeal was filed against this decree on the 22nd June 1917.

This was a very simple suit in essentials, but the first delay arose out of the difficulty in discovering the names of the living partners when the names of the members of the firm are those of men who are dead. The subordinate judge who commenced

the hearing of the suit was right to leave the question of jurisdiction to be decided with the other issues in a final judgment The result of the district judge deciding the question on a preliminary issue was to hold up the hearing for five years. The subordinate judge should have impressed upon the parties the necessity of applying for commissions for examination of the witnesses at an early date, and his method of recording evidence was objectionable and against the law. If he had kept the parties up to the mark in applying for commissions for examination of witnesses and had fixed his dates of hearing intelligently, and heard evidence from day to day, there is no reason why he should not have decided the suit within a year from the date of institution. The delay in disposing of the miscellaneous appeal is very noticeable. It should have been known that the appeal was a very simple one and that if it was allowed, as it was allowed, the case would have to go back for re-hearing. Priority should be given to the hearing of an appeal such as this. Making all allowances for the congestion in the courts concerned there was no reason why the suit should not have been decided originally within one year and why the final decision in appeal should not have taken place two years later. If that had been the case, the final decision would have taken place in 1910.

CASE IV.

Y *v.* A.

The plaintiff applie[redacted]eave to sue as a pauper. The plaint was to the following [redacted]s asserted that U a Hindu had three sons V, E, ar[redacted] died, being succeeded by P, that E died, being[redacted] defendant who was still alive, and that S. R. died without issue. N had two sons P. A. and R. P died leaving two widows the elder of whom was C. C adopted with N's consent N's son P. A. The adoption took place on the 30th March 1905. P. A. died in 1907. C then adopted the plaintiff Y her brother's son. The suit was by Y for possession of the property of P deceased, (C's husband) which was in the hands of N.

There were only three points for decision:—(1) whether P and N were joint or separate, (2) whether C had actually adopted Y and (3) whether she had authority to adopt Y.

The suit was instituted on the 3rd July 1911 and it was not until the 20th January 1913 that there was decision as to whether the plaintiff had a right to sue as a pauper. On the 20th January 1913 it was decided that he had a right to sue as a pauper and the suit proceeded. The 3rd March 1913 was fixed for filing the written statement and the settlement of issues.

The suit was adjourned four times for filing a written statement, which in the end was never filed. An oral statement was made by the defendant. Issues were framed on the 2nd April 1913 and

the suit was adjourned to the 17th June 1913 for the production of documents and evidence. On the 17th June 1913 two witnesses were examined for the plaintiff. On the 18th June 1913 three witnesses were examined for the plaintiff. On the 19th June 1913, the fifth witness for the plaintiff was cross-examined. The hearing was adjourned to the 5th August 1913 and the plaintiff was permitted to summon four new witnesses for that day. On the 5th August 1913 three of the witnesses for the plaintiff were examined and another was examined in chief. The suit was adjourned to the 2nd September 1913, but it could not be taken up on that date as the country was under floods. It was adjourned for hearing to the 1st October 1913. On that date one witness for the plaintiff was cross-examined, one witness was examined and one witness was withdrawn. This exhausted all the witnesses in attendance, and the plaintiff was allowed to summon six new witnesses for the 18th November 1913. On that date five of these witnesses were present, three were heard, one was ill and one was withdrawn. This exhausted that list. He was then permitted to summon six new witnesses for the 15th January 1914. On that date he examined two witnesses out of these six, withdrew three and was allowed to recall one for the 10th March 1914. He summoned six new witnesses for that day. On the 10th March 1914 one of these witnesses was heard, the rest were withdrawn and he was permitted to summon ten new witnesses for the 28th July 1914. Up till May 1914 nothing was done except the examination of three witnesses on commission. Permission was given to the plaintiff to examine these witnesses at this very late stage. There had been some question of appointing a receiver and upon this point an appeal was filed. The case was not returned till the 12th October 1914 and the hearing was adjourned to the 19th April 1915. On that date it was not taken up because the judge was otherwise occupied. He directed that it should come on for hearing on the 4th August and the 18th August 1915. On the 4th August 1915 the plaintiff concluded his evidence. The defendant was allowed to file his documentary evidence after the plaintiff had concluded his case. The defendant's evidence was heard on the 18th August 1915, 19th August 1915, 28th September 1915, 10th April 1916, 17th April 1916, 18th April 1916 and the 23rd August 1916. The arguments were heard on the 4th November 1916, the 11th November 1916 and the 20th November 1916. The judgment was delivered on the 15th December 1916 about five and a half years after the suit had been instituted.

It has been seen that indulgence was granted to the plaintiff to produce witnesses day after day whose existence he had previously not indicated. Attention has already been drawn to the fact that laxity in granting adjournments for this purpose results in the fabrication of false evidence. In this case that result apparently was obtained. Out of the witnesses called by the plaintiff in this manner twenty-one were called to prove that P and N were separate. The trial court found that not one of these

witnesses was telling the truth and in appeal the same conclusion was arrived at. It will be seen that in this case practically every rule as to production of oral and documentary evidence was broken. There was no attempt to hear the suit from day to day and it was due to this very unsatisfactory procedure that the case stretched out to such length.

Case V.

N. C. *v.* L. D.

This was a suit instituted *in forma pauperis* in the court of a district judge in which the plaintiff sued his brother for a share in his father's property. The suit was instituted on the 24th April 1909. The question as to whether the plaintiff was or was not entitled to sue *in forma pauperis* was not decided until the 13th December 1909. On that date the court decided that the plaintiff was not a pauper, and he was directed to pay the regular court-fee under penalty of dismissal of his suit. This order was taken in revision to a higher court. It decided on the 20th November 1911 (about two years afterwards) that the plaintiff was entitled to sue as a pauper. The suit was then recommenced. The plaintiff was ordered to produce his witnesses on the 30th July 1912. On that date he stated that his witnesses had been won over by the defendant, and asked for permission to produce a completely different set of witnesses on another date. He was granted to the 30th August 1912 for the purpose. On that date he asserted that the new witnesses whom he had secured had also failed, and asked for a further adjournment to enable him to secure a third set of witnesses. His application was granted. The suit was adjourned till the 11th October 1912. He produced eight witnesses on that date. This apparently closed his case. On 6th November 1912 the defendant produced ten witnesses; on the 25th November 1912 he produced six witnesses and on the 10th December 1912 he produced two witnesses.

On the 18th January 1913 a commissioner was appointed to record oral evidence on points which should have been settled on the evidence already before the court. He recorded the statements of fourteen more witnesses for the plaintiff and eight more witnesses for the defendant. He filed his report on the 14th February 1913 and the suit was decided on the 31st March 1913. It lasted altogether about four years, two years of which were spent in the decision of the revision application which could have hardly taken half an hour to argue. The latitude given to the plaintiff was surprising. It is not easy to conceive a greater inducement to the fabrication of false evidence than to permit a man to change his witnesses on three separate occasions, and further to permit him to call the majority of his witnesses after his case is closed. The failure to hear evidence from day to day is very noticeable. The suit was not a difficult one and if properly handled should have been decided in less than a year.

CHAPTER 7.

Constitution of Courts.

SECTION I.

Relief to District Judges.

1. It is next for consideration how far alterations are possible in the jurisdiction of courts. The amount of devolution which may be possible will not be uniform throughout the country, nor in any province will all the possible devolutions to which we refer be necessary. In some districts the district judges are not overburdened while the subordinate judges and munsifs are. In others it is otherwise. In some provinces village and panchayat courts have been established in considerable numbers and are already in a position to give relief in simpler cases. In others village courts are only beginning slowly to function. But in many districts in order to cope with the increasing mass of work additional help is necessary. It appears to us that this can be partially effected with greater convenience to the parties and less cost to the State by devolution of powers at present exclusively possessed by higher courts to lower ones situated nearer to the parties. Where an increase is necessary in the number of courts owing to existing courts being overworked or under-manned that increase should be made in the courts of lower rather than of higher rank. In regard to village and panchayat courts we hope to show that there is substantial promise that in the near future much of the simpler work of the lowest grades of courts can be taken over by them.

2. In Bengal, Assam, Bihar and Orissa and the Province of Agra there are under Act XII of 1887 the following classes of courts:—

1. The court of the District Judge.
2. The court of the Additional Judge.
3. The court of the Subordinate Judge.
4. The court of the Munsif.

In Madras in addition to the district judge there are munsifs and subordinate judges. In Bombay, the Punjab and the Central Provinces there are no munsifs, but there are corresponding to them subordinate judges of different classes, while in Burma the Township courts correspond to the munsifs' courts, and sub-divisional courts to subordinate judges' courts. Joint and assistant judges are found in Bombay but not in the other provinces. In addition to the courts constituted by the Bengal, Agra and Assam Civil Courts Act, 1887, provision is made in the United Provinces of Agra and Oudh for Benches of Honorary Munsifs by the United Provinces Honorary Munsifs Act, 1896. In Bengal members of a Union Board may be constituted a union court under the Bengal

Village Self-Government Act, 1919, for trial of simple cases of small value. Legislative provision for the constitution of village courts has been similarly made in Madras, Bihar and Orissa, the Punjab, the United Provinces, the Central Provinces and Burmah. We have to consider what changes in the jurisdiction of the several classes of courts above referred to will lead to more speedy and less costly justice. We think that one of such changes should be the devolution of powers from the district judge to courts subordinate to him.

3. Under the Civil Courts Act in every province in India the court of the district judge is the principal court of original civil jurisdiction in each district. Subject to the superintendence of the High Court the district judge exercises administrative control over all civil courts within the local limits of his jurisdiction. He may in some provinces assign such civil business as he thinks fit to subordinate judges and munsifs under him. He has jurisdiction to hear appeals from decrees and orders of all munsifs and of subordinate judges, when the value of the original suit in which or in any proceeding arising out of which the decree or order has been made does not exceed five thousand rupees. He has likewise power to transfer to any subordinate judge under his administrative control any appeals pending before him from the decrees of munsifs or officers corresponding to them. By virtue of his office he has the power of appointment, removal and transfer of most, if not all, the ministerial officers in all the courts in the district.

4. Having regard to the status and authority thus assigned to him by statute he obviously ought to be in a position to find the time needed for the discharge of his onerous duties. He must in the first place take up a reasonable share of the superior civil work and certain classes of original civil work. In the second place, he must be in a position to inspect regularly the civil courts under his control and be in touch with the work of the civil judicial officers in such a manner as to be able to guide and instruct them. This close supervision will in a great measure conduce to the strict adherence to the orders and rules prescribed for ensuring the speedy and fair trial of suits before the subordinate courts. Thirdly, he must find the time needed for studying and grasping the details of the nazarat, accounts and other ministerial departments and for exercising continuous supervision over them lest they get entirely into the hands of the sheristadar and the nazir.

5. It is well known and it is the opinion of district judges examined, that in many cases they cannot find the necessary time to discharge their duties in the above directions. The greater portion of many of the district judges' time is occupied by sessions and criminal appellate work, and during such time as the judge can devote to civil work, his attention is distracted by a variety of miscellaneous judicial work in respect of which under the existing law he has exclusive jurisdiction. If we expect the district judge to do justice in any way to the work which, as indicated

above, legitimately appertains to his office, a portion of his sessions work must be taken away from him, and he should be relieved of some of his duties which according to the view taken decades ago could only be efficiently performed by the officer who presided over a principal court of civil jurisdiction in a district. The general standard of efficiency of the subordinate judiciary has much improved in the last thirty years and we consider the time has now come when some further duties can be safely delegated to them.

6. In some districts where sessions work is comparatively heavy it is desirable in the interests of civil work that subordinate judges or additional judges be invested with the powers of additional or assistant sessions judge so that it may be possible for the sessions judge to transfer some of his sessions cases.

In some places the best arrangement will be for such subordinate judges to be given the hearing of appeals, (*e.g.*, from munsifs) as their civil work. In this way the trial of original suits will not be unduly interfered with by the criminal work. The duties of such judges would approximate closely to those of an assistant judge in Bombay.

7. The miscellaneous judicial work of the district judge is principally under the following enactments:—

(*a*) The Religious Endowments Act XX of 1863 and section 92 of the Civil Procedure Code.

(*b*) The Indian Succession Act X of 1865.

(*c*) The Probate and Administration Act V of 1881.

(*d*) The Succession Certificate Act VII of 1889.

(*e*) The Guardian and Wards Act VIII of 1890.

(*f*) The Provincial Insolvency Act V of 1920.

(*g*) The Land Acquisition Act I of 1894.

8. *The Religious Endowments Act, XX of 1863, etc.*—Section 2 of this enactment defines court as " the principal court of original civil jurisdiction in which the mosque, temple or religious establishment is situate, relating to which, or to the endowment whereof, any suit shall be instituted or application made under the provisions of the Act." Section 18 of the Act provides a preliminary application for leave to institute a suit being made to " the Court " (*i.e.*, to the Court of the district judge). These applications often entail a complicated enquiry and occupy much time and there is no reason why they should not be heard by a subordinate judge or munsif when the value of the endowed property is within their pecuniary jurisdiction. There is nothing peculiar in such proceedings having regard to the nature of the evidence tendered or the problems raised or the parties involved that they cannot now be entrusted to these courts. To obtain relief in the case of a breach of public trust of a religious or charitable nature section 92 of the Civil Procedure Code (Act V of 1908), in modification of section 539

of the old Code, expressly provides for the institution of the suit in the principal court of civil jurisdiction or in any other court empowered in that behalf by the Local Government. A similar change may be effected in the provisions of the Religious Endowments Act. Further, at present in many provinces the Local Governments have not taken steps, as we think they might, to delegate to subordinate judges the power to take cognizance of suits falling under section 92 of the Code of Civil Procedure.

9. *The Indian Succession Act X of 1865 and the Probate and Administration Act V of 1881.*—Section 235 of the Indian Succession Act provides that the district judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases. Section 235 (A) was added by the District Delegates Act of 1881 and enables the High Court from time to time to appoint such judicial officers within any district as it thinks fit to act for the district judge as delegates to grant probates and letters of administration in non-contentious cases. Sections 51 and 52 of the Probate and Administration Act make similar provisions for the disposal of applications under that Act. In order to cover sufficiently the area of each province the High Courts should make a liberal use of the provisions of these Acts by appointing such judicial officers as it thinks fit in every district as district delegates. In Bengal and Madras a substantial number of district delegates have been appointed in exercise of this power.

The effect of the provisions of these two enactments above referred to is to leave all contentious proceedings in probate and administration applications within the exclusive jurisdiction of the district judge. In any case before him in which there is contention the proceedings must take as nearly as may be the form of a regular suit according to the provisions of the Code of Civil Procedure, in which the petitioner for probate or letters of administration is the plaintiff and the person who may have appeared to oppose the grant is the defendant.

The Bengal, Agra and Assam Civil Courts Act 1887 makes provision in section 23 for the High Court by general or special order to authorise any subordinate judge or munsif, to take cognizance of, or any district judge to transfer to a subordinate judge or munsif, under his administrative control, any contested proceedings under the Indian Succession Act and the Probate and Administration Act 1881. Similar provisions occur in section 30 of the Punjab Courts Act of 1918, in section 19 of the Central Provinces Courts Act (I of 1917) and in section 28 (A) of the Bombay Civil Courts Act of 1869, as recently amended. In Madras, however, there is no such power at present. Even where the power to transfer individual cases exists it has not as far as we can ascertain been availed of. We recommend that, where the District and Additional Judge's work is heavy the High Courts should exercise their existing powers so that contested cases may be transferred for hearing to the senior subordinate judges and for this purpose the Madras Act may be amended.

Objection has been taken in some quarters, to matters relating to intestate and testamentary succession being dealt with by officers of a lower rank than a district judge on the ground that the decisions are in the nature of judgments *in rem*. Whatever weight this objection might have had at the time when the Madras Civil Courts Act was enacted and an enabling provision analogous to that contained in the Punjab and Bengal Civil Courts Acts was omitted, there seems to be no justification for perpetuating the exclusive jurisdiction of the district judge and additional district judge to hear and determine all contentious probate and administration cases. The very fact that such a devolution is contemplated and provided for in the later Acts above referred to would seem to furnish justification for the view that the objection is no longer of any great weight.

10. In the case of *the Succession Certificate Act* (*Act VII of 1889*) though the court having jurisdiction to grant the succession certificate is by section 5 primarily the district court, section 26 provides for the Local Government by notification in the official gazette investing any court inferior in grade to a district court with the functions of a district court under the Act and in practice in certain provinces subordinate judges and munsifs have been invested with such powers. A more extended use of the powers of the Local Government in all the provinces will effectually eliminate from the miscellaneous work of district judges the necessity of hearing applications which we understand sometimes take long in their disposal.

11. Section 4 of *the Guardian and Wards Act VIII of 1890*, defines the Court as "the District Court having jurisdiction to entertain an application under the Act for an order appointing or declaring a person as guardian and in any matter relating to the ward the District Court having jurisdiction in the place where the ward for the time being ordinarily resides." By that Act jurisdiction in guardian and wards cases is given exclusively to the district judge and an appeal lies to the High Court against his orders in a variety of matters such as the appointment and declaration of guardians and their removal or discharge, the custody of minors and the regulation of the conduct or proceedings of the guardian.

Applications under the Act often relate to estates whose value is much less than the pecuniary jurisdiction of munsifs. They are sometimes filed with the sole object of stopping a marriage, securing the custody of a minor or harassing a woman who is managing her infant's estate as natural guardian or for other ulterior purposes unconnected with the welfare of the minor and often in order to allow of alienation of immovable property to pay ancestral debts. The guardian when appointed is put on terms and in the discharge of his duties under the bond executed by him, he files accounts and from time to time seeks the directions of the court on various matters. The hearing and determination of these

applications naturally take time and interfere with other more important work of the district judge.

Section 19 of the Central Provinces Act I of 1917 and section 30 of the Punjab Courts Act VI of 1918, provide for the transfer of proceedings under the Guardian and Wards Act 1890 to any subordinate judge according to the general or special order of the Judicial Commissioner and High Court respectively. The absence of similar provisions in the Civil Courts Acts of other Provinces has nothing to do with the propriety or desirability of the devolution of the district judge's powers at the present day to lower judicial tribunals under his control. Here again we consider there is no objection to contested cases being heard by senior subordinate judges. The power already exists under the Punjab and Central Provinces Acts and we consider that it should be used when necessary and provision made in the other Civil Courts Acts for similar powers of transfer.

12. Under section 3 of *the Provincial Insolvency Act V of 1920*, a Local Government has power to invest any subordinate court with jurisdiction in insolvency, but in such cases an appeal against orders passed by such subordinate courts will lie first to the district court and not direct to the High Court and all such orders are appealable. So far as we are aware except in Madras and Bombay and to a certain extent in Agra and the Punjab little is being done to invest subordinate courts with these powers. In Bengal and Assam at present four only of the subordinate judges are so invested. In Madras, however, where considerable use is being made of this provision, it is only in respect of petitions by debtors, all petitions by creditors having still to be presented to the district judge. We think that Local Governments may well consider in consultation with the High Courts whether in districts where insolvency petitions are many and district judges' work heavy, a considerable amount of devolution could not be made.

13. Under section 3 of *the Land Acquisition Act (I of 1894)*, the expression "Court means a principal civil court of original jurisdiction, unless the Local Government has appointed (as it is empowered to do) a special judicial officer within any specified local limits to perform the functions of the court under this Act." The function of the principal civil court is, on a reference from the Collector, to determine objections to the measurement of the land, the amount of the compensation, the persons to whom it is payable or the apportionment of the compensation among persons interested. Similar objections are ordinarily raised and decided in the munsifs' and subordinate judges' courts and there is nothing in their nature which is beyond the comprehension of these judicial officers. There is no substance in the argument that these judicial officers are likely to favour the Government any more than the district judge. As a matter of fact they try and decide a large number of cases instituted by and against the Secretary of State without their impartiality being impeached.

Cases under the Act occupy a good portion of the time of some district courts and most of them are kept pending for one reason or another for an inordinately long time. Both for the speedy disposal of these cases and on account of the relief to the district judge incidental to their transfer to other judicial officers in the district appointed on this behalf, it is recommended that the Local Governments should, as has recently been done in Madras, take more action under the powers conferred by section 3, clause (*d*) above quoted.

14. The Bihar and Orissa Retrenchment Committee recommended "the trial by the subordinate judges of Insolvency, Succession, Probate and Administration and contested Will cases." A similar recommendation was made by the Madras Judicial Retrenchment Committee, which advised that whenever circumstances permitted subordinate judges should be empowered to try cases under the Succession Certificate Act and Land Acquisition Act and that, if necessary, munsifs should also be empowered to try cases under these Acts, where the value of the subject matter was within their pecuniary jurisdiction. They also recommended the appointment of subordinate judges and munsifs as district delegates for the purpose of hearing non-contentious cases under the Succession and Probate Acts and that munsifs and subordinate judges should be invested with insolvency jurisdiction with regard to creditors' applications. These suggestions have been accepted and acted upon by the Madras Government recently to a very substantial extent. The Bengal Retrenchment Committee in making proposals for the employment of a "cheaper agency" recommended "the hearing by subordinate judges of Insolvency, Succession, Probate, Administration and contested Will Cases" and opined that small succession cases might be heard by experienced munsifs but we understand that the Local Government in view of the opinion of the High Court has not seen its way to take action in this direction, save as regards succession certificates and uncontested probate cases.

We may also add that very many of the witnesses who appeared before us favoured the devolution of the powers of the district judge under special Acts to the courts subordinate to him and under his administrative control.

Section II.

Relief to Subordinate Judges and Munsifs.

1. If, as we suggest, district judges should when necessary be relieved of some of their duties under special Acts by transferring the same to subordinate judges and munsifs, these latter in their turn would require relief also in regard to their present duties.

We appreciate, however, that owing to the special conditions of each province what can be done in this direction must vary in different parts of India. The main line on which we think that the devolution or reduction of work can be effected is in three ways:—

(1) By increasing the number of suits that can be tried under Small Cause Court procedure, (*a*) by increasing the jurisdiction and pecuniary powers of the different grades of Small Causes Courts and (*b*) by extending the Small Causes Court procedure to classes of cases now exempted by the schedule attached to the Act.

(2) By increasing the powers of munsifs to try original suits up to a higher pecuniary value, and so relieve subordinate judges of the trial of smaller cases.

(3) By the development of village tribunals (by whatever name called) by investing them with jurisdiction for the trial of certain classes of suits, say, up to the value of Rs. 100.

2. The attached statement sets out the present jurisdictions in ordinary and small cause suits of subordinate judges and munsifs in the different Provinces of India.

Present Jurisdiction of Subordinate Judges and Munsifs.

Province.	SUBORDINATE JUDGES.			MUNSIFS AND OFFICERS CORRESPONDING THERETO.			Acts defining the jurisdiction.
	ORDINARY SUITS.		MAXIMUM POWERS IN SMALL CAUSE SUITS.	ORDINARY SUITS.		MAXIMUM POWERS IN SMALL CAUSE SUITS.	
	Normal.	Special.		Normal.	Special.		
1	2	3	4	5	6	7	8
			Rs.	Rs.	Rs.	Rs.	
Bengal . .	Unlimited .		500	1,000	2,000	250	Act XII of 1887.
Assam . .	Do. .		500	1,000	2,000	250	Do.
Bihar and Orissa.	Do. .		500	1,000	4,000	250	Act XII of 1887 and B. and O. IV of 1922.

Province.	SUBORDINATE JUDGES.			MUNSIFS AND OFFICERS CORRESPONDING THERETO.			Acts defining the jurisdiction.
	Ordinary Suits.		Maximum powers in Small Cause Suits.	Ordinary Suits.		Maximum powers in Small Cause Suits.	
	Normal.	Special.		Normal.	Special.		
1	2	3	4	5	6	7	8
			Rs.	Rs.	Rs.	Rs.	
Madras . .	Unlimited .		500	3,000	..	200	Act III of 1873. Mad. Act III of 1916. Mad. Act VI of 1919.
Coorg . .	Do. .		..	500	1,000	100	Regn. I of 1901.
Bombay .	Do. .		1,000	5,000	..	200	Act XIV of 1869. Bo. Act I of 1900.
Sindh . .	Do. .		500	5,000	..	200	Act XII of 1866. Act I of 1906. Act I of 1910. Act II of 1916.
Agra . .	Do. .		500	1,000	2,000	250	Act XII of 1887.
Oudh . .	Rs. 10,000	May be unlimited.	500	1,000	2,000	250	Act XIII of 1879. U.P. Act II of 1912. Act IV of 1914. Act XXXVIII of 1922.
Punjab . .	To be fixed by the High Court.		500	To be fixed by the High Court.		500	Pun. Act VI of 1918. Pun. Act IX of 1919. Pun. Act IX of 1922.
Delhi . .	Unlimited .		500	..	..	..	Act XIII of 1912.
N. W. F. Province.	May be unlimited. To be fixed by Judicial Commissioner.		500	To be fixed by the Judicial Commissioner, but not exceeding Rs. 1,000.		500	Regn. VII of 1901.
Burmah .	Rs. 5,000	May be unlimited.	500	500	2,000	500	Burma Act XI of 1922.
Central Provinces and Berar.	10,000	Do.	500	5,000	..	200	C. P. Act I of 1917. C. P. Act VIII of 1923.

N.B.—The normal powers of all officers are those set out in columns 2 and 5 but selected judges and munsifs may be invested with the higher powers set out in columns 3 and 6 in special cases.

The figures mentioned in columns 4 and 7 are the maximum powers with which the officers may be invested.

3. The law relating to Courts of Small Causes outside the Presidency Towns of Calcutta, Madras and Bombay and the City of Rangoon is the Provincial Small Cause Courts Act, IX of 1887, which extends to the whole of British India except those towns.

Small Causes Courts Jurisdiction.

Section 15 of the Act provides as follows:—

"(1) A Court of Small Causes shall not take cognizance of the suits specified in the second schedule as suits excepted from the cognizance of a Court of Small Causes.

(2) Subject to the exceptions specified in that schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes.

(3) Subject as aforesaid, the Local Government may, by order in writing, direct that all suits *of a civil nature of which the value does not exceed Rs. 1,000,* shall be cognizable by a Court of Small Causes mentioned in the order."

4. Thus, without further legislation, the subordinate civil courts can be invested with jurisdiction to try suits of which the value does not exceed Rs. 1,000, under the small cause procedure. The preponderance of opinion in all the Provinces except Burma is that the small cause jurisdiction of subordinate judicial officers should be increased to Rs. 500 in the case of selected munsifs and officers corresponding to them and to Rs. 1,000 for subordinate judges with unlimited original jurisdiction. Judges exercising small cause powers take only notes of evidence; such notes need not be read out to witnesses whose examination and cross examination is less elaborate, and the judgments simply embody the findings on the points for determination and not the reason for the decision. There is no appeal against the decree. These causes moreover do not require all the elaboration and delay of an ordinary trial and the issues involved in them being of a very simple kind depending generally on oral evidence or accounts, parties are not likely to suffer in any way by the disposal of those suits under this procedure and should welcome the more speedy determination of such litigation.

5. The ordinary upper limit of small cause jurisdiction was fixed at Rs. 500 by the Provincial Small Cause Courts Act more than 35 years ago. Having regard to the improved capacity of the present day subordinate judicial officers and the time which has elapsed since that standard was fixed, we suggest that the maximum of Rs. 1,000 contemplated in the Act should be worked up to in the manner suggested above in as many courts as possible. Not only would there be an appreciable saving of time so far as subordinate judges and munsifs are concerned by the disposal of a large number of suits on the small cause side, but there would be also a substantial reduction in the number of first appeals to the district court. Many of such appeals are now preferred in suits

of a small cause nature and are often filed simply to delay execution. As a corollary to this recommendation we also recommend that section 102 of the Code of Civil Procedure be amended by raising the limit of Rs. 500 in suits of the nature cognizable by Courts of Small Causes to Rs. 1,000 as suits in which no second appeal shall lie.

6. The number of suits for moneys and movables in Madras is 95 per cent., in Punjab 84 per cent. and in Bengal (where rent suits alone are over 50 per cent.) about 35 per cent. of the total number of institutions. An increase in the number and jurisdiction of the courts which can exercise summary powers in these matters should necessarily reduce the work which the subordinate judges and munsifs will have to do. To make this proposal, however, the more effective in some provinces it may be necessary to re-arrange territorial jurisdictions in Small Cause Court suits so as to provide that all suits of a small cause court nature as far as possible shall be tried by judicial officers holding small cause court powers. We understand that recently an experiment was made in certain parts of the Madras Presidency of establishing special Small Cause Courts for the trial of Small Cause Court suits over a large area and that this experiment has not been successful. It is no part of the suggestion that special Small Cause Courts should be set up having jurisdiction over large areas.

Section III.

Extension of Small Cause Court Jurisdiction.

In connection with the economical and expeditious disposal of petty litigation the question next arises whether any class or classes of suits now excluded from the jurisdiction of Small Cause Courts can be eliminated from Schedule II of the Provincial Small Cause Courts Act of 1887. Ordinarily a Small Cause Court has jurisdiction to try all suits of a civil nature up to a particular pecuniary limit, except such classes of suits as are excluded by the schedule. Section 6 of the Mofussil Small Cause Courts Act, 1885 (repealed by the Provincial Small Cause Courts Act, 1887) specified the suits which were within the jurisdiction of small cause courts. They were claims for money due on bonds or other contracts or for rent, or for personal property, or for the value of such property or for damages when the debt, damage or demand did not exceed the amount of five hundred rupees, whether on balance of account or otherwise. A proviso excepted from the cognizance of Small Cause Courts actions based on partnerships, intestate and testamentary succession, damages for personal injury unless actual pecuniary damage had resulted and claims for rent on land which might be brought before revenue officers unless the court was specifically authorized. There is under the present Act XII of 1887, no definition of "small cause suits." They are suits the cognisance of which by a small cause court is not disallowed as coming within the second schedule of

the Act. It is difficult to say why the suits referred to in some of the articles of the Schedule should not now be tried on the small cause side, whatever may have been the reasons which nearly forty years ago induced the framers of the Act to exclude them. Speaking broadly suits of a comparatively simple character and small pecuniary value may be tried by small cause courts and there is nothing inherently complicated in the character of the classes of suits hereunder dealt with justifying their exclusion from the category of simple causes of small value. We have carefully examined the various suggestions made by witnesses in this matter in all the Provinces and have come to the conclusion that the time has arrived when the following classes of suits may be tried by this procedure.

Ejectment.

2. *Article 4* of the Second Schedule relates to a suit for the possession of immovable property or for the recovery of an interest in immovable property and *Article 11* relates to a suit for the determination or enforcement of any other right to or interest in immovable property. It has been suggested that suits in ejectment based on written leases when the term has expired and not coming under any special or local law are of a simple nature and could be heard and determined with more expedition on the small cause side but for the existence of these articles. Chapter VII of the Presidency Small Cause Courts Act provides for the issue of summons against a person occupying property without leave and for orders being passed directing him to give possession of the property to the applicant for delivery of possession. We do not propose to go so far for the districts as has been provided for the presidency towns, especially as one of the broad principles of the Schedule is to exclude suits relating to immovable property; but where a judge can either under the exception to Article 8 or otherwise hear a suit for house or other rent, there is no reason why he should not also try and decide ejectment suits dealing with the same class of property.

Mortgage.

3. *Article 6* relates to suits by a mortgagee of immovable property for the foreclosure of the mortgage or for the sale of the mortgaged property or by a mortgagor of immovable property for the redemption of the mortgage. Suits on hypothecation deeds in which the only point to be considered is a plea of discharge do not differ from suits to enforce a hypothecation of movables or suits on bonds or for money simply, all of which are treated as small causes. There seems to be no serious objection to treat as small causes those suits in which the mortgagors or their heirs or legal representatives alone are parties and there are no prior or subsequent encumbrances. There is a large volume of evidence in support of this change and almost all the witnesses who appeared before us hold the view that in simple mortgage suits one decree is ordinary enough and there need not be a preliminary and a final decree. This view with which we agree will make the procedure in such suits simpler than it now is and so make them more easy to deal with.

It may be difficult sometimes for the plaintiff when he files the plaint to find out whether the suit is going to be contested or what the defence will be and this might cause confusion and inconvenience in the actual working of the rule suggested. Similar difficulties, however, do exist in cases in which the plaintiff's title is in question and resort has to be had to section 23 of the Act. But they do not prevent a large number of suits being tried on the small cause side in which the defendant raises incidentally a question relating to title to immovable property or an interest therein. A similar proviso might be devised to meet the case of mortgages. No doubt some defendants may put in frivolous pleas in order to oust the jurisdiction of the small cause court. But the Court has power to reject any plea which is not *bonâ fide* and is put forward simply to oust jurisdiction and such power is often exercised in cases in which unnecessary declarations or taking of accounts are prayed for. The advantage of the inclusion of simple mortgage suits of the kind described in small causes is that a large number of suits now held up for a long time as ordinary suits will be speedily and finally disposed of on the small cause side.

Rent.

4. *Article 8* excludes suits for the recovery of rent other than house rent unless the judge has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto. There is no reason why this power should not be freely exercised and why more rent suits should not be tried and disposed of on the small cause side. 85 per cent. of such suits would be uncontested. Even those which are contested would but raise points which should and could be effectually decided by a Court of Small Causes. If any question which cannot be so decided arises, there is section 23 of the Act, the aid of which may be easily invoked by the party desiring to have the suit heard on the ordinary side. Besides, it may be noted that the recommendation is not to make all rent suits triable as small causes. We do not propose to touch Article 7 which excludes from small cause jurisdiction suits for the assessment, enhancement, abatement, or apportionment of rent of immovable property or to include rent suits brought under special or local acts. It is in those classes of cases that the decisions of the court would really affect the tenants permanently. It may be suggested that decrees for rent in successive years would have an important bearing on the question of fixity of rent or permanency of tenure and so Article 8 should continue as it is. But the very provision permitting the Local Governments to exclude if necessary Article 8 from the schedule and the fact that in the Madras Presidency, where the authority to exercise such jurisdiction has been given to all subordinate judges and munsifs and has been so exercised for many years, no hardship has been felt in practice must allay any such apprehension.

Suits relating to trusts.

5. *Article 18* refers to a suit *relating to a trust*, including a suit to make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust and a suit by a co-trustee to enforce

against the estate of a deceased trustee a claim for contribution. The words "relating to a trust" mean literally "standing in some relation to; having bearing on or concern with; pertaining to; referring to a trust," but they could not have been intended to be construed in this wide sense. These words have given room for a number of decisions of High Courts regarding their interpretation. The corresponding words in the Presidency Small Cause Courts Act are "suits to enforce a trust." Those words may be substituted for "relating to a trust" in Article 18, to avoid ambiguity and to confine the article to cases where the terms of a trust form the real subject matter in dispute. To make the matter even more certain the latter portion of the section from the words "including" up to the end may remain as they are. Again, it should be made clear that the article applies only to express trusts. A number of cases could be conceived where some sort of relationship of trustee and *cestui que trust* exist and it would waste the time of the ordinary courts to make them attend to disputes arising out of such relationship in suits really of a small cause nature. So it is necessary to make the language plain and certain.

Claim cases.

6. *Article 20* in so far it relates to civil suits under section 283 of the old Code of Civil Procedure corresponding to Order 21, rule 63, should be confined to immovable property. As the article stands a suit which is in substance one to recover a chattel of small value has to be filed on the ordinary side and a first appeal and second appeal may be taken against the decree passed in the suit. For similar reasons *Article 21 dealing* with suits to set aside an attachment by a court should be confined to immovable property. We have considered whether the exemption for declaratory suits might not be abrogated in some other cases. It is not infrequent in some provinces for a person who apprehends that he may be sued in the small cause court for a small sum of money, *e.g.*, on a promissory note for Rs. 10, to evade the jurisdiction by filing a suit on the ordinary side asking for a declaration, *e.g.*, that the promissory not was obtained by undue influence or is not supported by consideration. When he is sued in the small cause court an application is made to transfer the small cause court suit to the ordinary side. This results not only in considerable delay as regards the trial but in making possible an appeal. It is not easy to counter such tactics. It seems to us that declarations in such cases are absurd and that the correct form of remedy is for the ordinary suit to be brought on for hearing promptly and dismissed as misconceived and as intended to evade jurisdiction. We know of no principle which obliges a court in circumstances such as these to grant a declaration.

Foreign judgments.

7. According to *Article 25* a suit upon a foreign judgment, even relating to money or movable exclusively, is not within the small cause jurisdiction of a court. If the suit were brought on the original cause of action it would be a small cause suit and the court would be competent to decide pleas of *res judicata* relating to the claim; that is to say, if the defendant

pleads a foreign judgment in his favour against the plaintiff as *res judicata* in a suit on the original cause of action in the small cause court, that court has to and is now competent to consider its validity. It is therefore not apparent why a person who has a foreign judgment in his favour should not institute a suit based on it as plaintiff on the small cause side. The points referred to in section 13 of the Code of Civil Procedure in connection with the conclusive character of foreign judgments have to be considered if as above pointed out the same be put forward by the defendant in support of his plea. A small cause judge who has to decide as many questions of law on the small cause side as he does on the ordinary side might well be trusted to deal with the questions of law which arise for decision in enforcing a judgment of a foreign court. The number of cases under this Article is large in Madras and perhaps in other places; where this is so the Local Government shall be empowered to exclude such suits from the Schedule.

Refund of assets.

8. *Article 26* dealing with a suit to compel a refund of assets improperly distributed under section 295 of the former Code of Civil Procedure may be omitted and the law restored to what it was before this article was enacted.

Mesne profits.

9. There seems to be no reason for excluding suits for mesne profits from the category of Small Cause suits when suits for damages against trespassers are admittedly of a small cause nature. There has been considerable confusion on the interpretation of *Article 31* relating to mesne profits. The view according to which such suits would be triable as small cause suits seems to be more sound and the article should be so amended by making this clear.

Damage by criminal act.

10. Both *Articles 35* (*ii*) and *43* (*a*) may be deleted. Many trumpery suits such as those for palm leaves cut and carried away by a trespasser or for conversion of a few measures of paddy are now tried on the ordinary side, because, technically, the act charged amounts to an offence under the Indian Penal Code. The history of the legislation by which these two articles came to be included in the schedule shows that it was considered desirable that suits against public servants relating to their acts which might, technically, constitute criminal offences, should not be heard and determined by small cause courts though in form such suits are, merely, for recovery of damages. It could not have been in the contemplation of the framers of these provisions that petty suits of the kind indicated above were to be filed on the ordinary side.

Maintenance.

11. Suits of the nature contemplated by *Articles 13* and *38*, where the right claimed is based on a written instrument may well be made cognizable in a Court of Small Causes. The expression " relating to " used in Article 38 is the same as that in Article 18, and the former article excludes suits relating to maintenance. The expression would cover suits in which neither the right to maintenance nor the extent or amount of maintenance is a matter in issue requiring

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determination. This could not have been contemplated by the framers of the articles in question. Experienced judges examined by us are in favour of maintenance claims based on contracts and reduced to writing being dealt with on the small cause side.

12. Many witnesses suggested that suits relating to simple partnerships should be allowed to be brought on the small cause side. No doubt petty concerns of this kind are capable of summary disposal and deserve no more. But the difficulty is in deciding at the outset what is a simple partnership and what is not. Cases are not infrequently found where the nominal prayer is to recover Rs. 50 and the suit is valued accordingly, but there is always an additional prayer for accounts and an offer to pay the court fees on the amount found due. Moreover the capital of a partnership may be small, but the total turn-over of the concern may be of considerable value. On the whole the balance of convenience will be to have partnership suits of whatever value tried as regular suits.

13. While making these recommendations for the extension of small cause court jurisdiction, we consider that it will be also necessary to add in respect of the extended jurisdiction, which we propose above, a general section in the Act empowering a district judge on the petition of the defendant to transfer to the ordinary side of the same or any other court any suit which in consequence of these proposals will now be a small cause suit. This is necessary as the right to transfer a suit is at present subject to section 24 (4) of the Code of Civil Procedure. It is necessary further to provide a right of appeal in such cases. We make this suggestion for the reason that though, as a general rule, simple mortgage suits, ejectment suits and petty claims for damages caused by criminal acts, are cases which could be tried under the shortened procedure, nevertheless owing to the defences set up or the complexity of the matter or because, as a matter of fact, the suits are really concerned with Government the jurisdiction of the small causes court should not be made exclusive.

Section IV.

Increase of Pecuniary Jurisdiction of Munsifs and Officers corresponding to them.

1. The table in section II of this chapter will show at a glance the jurisdiction of the civil courts as at present fixed by the Acts relating to the different Provinces.

2. In Bombay so early as 1869, second class subordinate judges (corresponding to munsifs in other provinces) were invested with power to try suits of the value not exceeding Rs. 5,000 as soon as they entered on their office.

3. In Madras the district munsif's pecuniary jurisdiction was fixed in 1873 at Rs. 2,500 and increased in 1916 to Rs. 3,000. There is now a Bill before the local legislative council for increasing the jurisdiction to Rs. 4,000 in special cases.

4. The Central Provinces Courts (Amendment Act) of 1923 has, amending Act I of 1917 which had fixed the jurisdiction of Munsifs at Rs. 1,000, altered their designation to "2nd class subordinate judges" and substituted Rs. 5,000 for Rs. 1,000 as the maximum limit of pecuniary jurisdiction. This limit, however, is reached by gradual stages according to the service and proved capacity of the individual officers and not every second class subordinate judge actually exercises jurisdiction up to the full amount. The following table relating to the courts in the Nagpur District illustrates the method adopted by administrative rules and orders in fixing the original, appellate and small cause jurisdiction according to local needs in that district.

Courts.	Jurisdiction.
District Judge . . .	Appeals against decisions of courts in the interior. Other appeals over Rs. 500 and not over Rs. 5,000.
Additional District Judges .	Suits over Rs. 15,000. Appeals not over Rs. 500, other than appeals from courts in the interior.
1st Class Subordinate Judge and 2nd Additional District Judge.	Suits over Rs. 5,000 and not over Rs. 15,000.
2nd Subordinate Judge, 1st Class.	Suits over Rs. 2,000 and not over Rs. 5,000.
1st Subordinate Judge, 2nd Class.	Suits over Rs. 1,000 and not over Rs. 3,000.
2nd Subordinate Judge, 2nd Class.	Ordinary suits not over Rs. 200.
Judge, Small Cause Court .	Small Cause Court Suits not over Rs. 1,000.
Registrar, Small Cause Court and Additional Judge to the Court of 1st Subordinate Judge, 2nd Class.	Suits over Rs. 200 and not over Rs. 1,000.
Judge, Small Cause Court, Kamptee, and Additional Judge to the Court of 1st Subordinate Judge, 1st Class, Nagpur.	Suits not exceeding Rs. 2,000 and Small Cause Court suits not over Rs. 1,000.
Subordinate Judge, Kotal, 2nd Class.	Suits not over Rs. 2,000 and Small Cause Court suits not over Rs. 200.
Subordinate Judge, Ramtek .	Suits not over Rs. 2,000 and Small Cause Court suits not over Rs. 200.

Courts.	Jurisdiction.
Subordinate Judge, Umrer	Suits not over Rs. 1,000 and Small Cause Court suits not over Rs. 200.
Subordinate Judge, Sacner	Suits not over Rs. 2,000 and Small Cause Court suits not over Rs. 200.

5. In Bihar and Orissa the powers of subordinate judicial officers are regulated in the same way. Subordinate judges have unlimited jurisdiction in ordinary suits and small cause powers up to Rs. 500 and munsifs are invested with jurisdiction graduated according to local requirements and individual experience as shown in the following table, the maximum being Rs. 4,000:—

Ordinary Powers.	Number of Munsifs exercising the power.
Up to Rs. 4,000	7
Up to Rs. 3,000	3
Up to Rs. 2,000	19
Up to Rs. 1,000	52

including 9 Deputy Collectors with Civil Court powers.

Small Causes Court Powers.	
Up to Rs. 250	19
Up to Rs. 100	30
Up to Rs. 50	5

6. In Bengal, Agra and Assam the normal jurisdiction of a munsif is fixed by section 19 (1) at Rs. 1,000 and may be increased by special notification to Rs. 2,000.

7. In the Punjab the pecuniary limit of jurisdiction of a subordinate judge is determined according to the grade in which he is included. The existing jurisdiction is graded as follows:—

1st class	Subordinate Judge	Rs. Unlimited.
2nd class	Do.	Rs. 5,000.
3rd class	Do.	Rs. 3,000.
4th class	Do.	Rs. 1,000.

8. In Burma quite recently (May 1924) a notification has issued under the Burma Courts Act of 1922 reconstituting all the courts outside the city of Rangoon and certain areas specially exempted from the operation of the Act. The civil districts, sub-divisions and townships thus reconstituted are the same as for administrative and revenue purposes and about 40 per cent. of the subdivisional and township judges are also additional magistrates. Township courts have jurisdiction ordinarily to try suits of the

value not exceeding Rs. 1,000 which may be increased to Rs. 2,000 in special cases, while the sub-divisional courts have jurisdiction ordinarily to try suits of the value not exceeding Rs. 5,000 which may be extended to suits or original proceedings without restriction as to value.

9. Subordinate judges in Bengal, Assam, United Provinces and Madras and 1st class Subordinate Judges in other provinces—except the Central Provinces where their jurisdiction is confined to suits not exceeding in value Rs. 10,000—can exercise unlimited jurisdiction in hearing and determining original suits. We do not see any reason why selected munsifs senior in service and about to be promoted to the grade of subordinate judge should not be invested if necessary in each district with powers to try original suits and proceedings of the value of Rs. 5,000. As already pointed out, in Bombay second class subordinate judges (corresponding to munsifs) start with a pecuniary jurisdiction of Rs. 5,000, and in Madras with that of Rs. 3,000. If the powers of munsifs be extended as suggested, a large number of suits now tried by subordinate judges might be tried by the former and substantial relief afforded to the latter to enable them to take over work of district judges under the various enactments already referred to. There would be reduction in the number of appeals to the district judges if the small cause jurisdiction of the munsifs and subordinate judges were increased and the distinction would also tend to disappear between appeals which must be heard by district judges and those which may be heard by them or by subordinate judges.

Some hesitancy and reluctance were displayed by the witnesses examined by us in some of the provinces in approaching the question of enhancement of the original jurisdiction of munsifs. But the evidence taken as a whole is in favour of the extension of powers on a more liberal scale and to a larger number of subordinate judicial officers than at present. We accordingly recommend that Local Governments should take steps at an early date to get their Civil Courts Acts amended, so as to make them more elastic by adopting in principle the system which obtains in the Central Provinces. The legal maximum of the pecuniary jurisdiction of munsifs should be raised to Rs. 5,000 and individual officers by administrative orders should be empowered up to figures within that limit according to their capacity, experience, the nature and the extent of the work and local conditions.

Section V.

Village tribunals.

The Village Panchayat—villagers mediating between contending parties in their own village—has, in some form or other, existed in this country from the earliest times and that without resort to any elaborate or complicated machinery. The Royal Commission on Decentralization in India of 1907 observed:

"Throughout the greater part of India the word panchayat is familiar. The lower castes commonly have voluntarily constituted panchayats to whom they allow *quasi-judicial* authority in social matters." Informal panchayats exist to-day which, though they are "extra-legal" and have no statutory warrant, settle disputes relating to marriage, divorce and succession, the recovery of debts and the partition of property, and their decisions are accepted by the rival claimants. The judicial work of the panchayat is part of that village system which in most parts of India and Burma has been the basis of the indigenous administration from time immemorial.

2. According to Narada "Family meetings (Kula), corporations (Sreni), village assemblies (Gana), some one appointed by the king and the king himself are invested with the power to decide law suits: and of these each succeeding is superior to the one preceding it in order."

Asahaya commenting on this passage observes: "A suit decided in a village goes on appeal to the city (court). What has been decided in the city (court) goes on appeal before the king, *i.e.*, the king's court; but there is no appeal from the decision of the king, whether right or wrong."

Yagnavalkya also mentions a similar gradation of local courts such as *Kula*, *Sreni*, and *Puga* arranged in an ascending order of importance, the *Kula* being the lowest court composed of kinsmen for arbitration in small matters, from which an appeal lay to the next higher courts. The *Sreni* has been defined by the Mitakshara as the court constituted of traders or artisans including men of different castes, but pursuing similar means of livelihood; and the *Puga* as the court constituted by men of different castes and occupations but inhabiting the same village or town."

The principle underlying these subordinate and local courts has been thus summarised in the *Sukraniti*. "In case of dispute the best men of the locality concerned can alone be the proper judges. Foresters are to be tried with the help of foresters, merchants by merchants, soldiers by soldiers, and in the village by persons who live with both parties."

For the decision of disputes between two villages or between inhabitants of the same village rules for the appointment of judicial boards exist in some of the early books. The *Arthasastra* contains the following:—

> "In all disputes regarding the boundary between two villages, neighbours or elders of five or ten villagers shall investigate the case on the evidence to be furnished from natural or artificial boundary marks." Disputes arising in the same village "shall be decided by the elders of the neighbourhood or of the village. If they are divided in their opinion decision shall be sought for in such a place as is noted for a number of pure and respectable people."

Epigraphical evidence supports the conclusion that village assemblies in mediæval times played an important part in the administration of rural affairs acting in this respect as intermediate units between the individual and the State. Among the various committees of these assemblies were committees of justice which adjudicated between parties and settled their disputes. In later times nearly all reports of the early British administrators in India speak of the "headman" as the main judicial authority of the village. Village courts in the Madras Presidency have been in existence on a statutory basis for over a century and in their present form since 1889 and evidence is not wanting that there have always been communal panchayats, functioning in an informal manner, in the other Provinces.

3. The Decentralization Commission recommended the constitution and development of village panchayats possessed with certain administrative powers with jurisdiction in petty civil and criminal cases. The Government of India, in their resolution of May, 1915, on Local Self-Government after remarking that village tribunals for the disposal of petty civil suits had got beyond the experimental stage in some places and were in the experimental stage in others, suggested certain general principles as indicating the lines on which advance was most likely to be successful, one of which is as follows:—

> "The jurisdiction of panchayats in judicial cases should ordinarily be permissive, but in order to provide inducement to litigants reasonable facilities might be allowed to persons wishing to have their case decided by panchayats. For instance court fees if levied should be small, technicalities should be avoided and possibly a speedier execution of decrees permitted."

Since the date of their report in practically all the chief provinces except Bombay steps have been taken to develop village courts on a popular basis. But so far, in most provinces except in Madras and in the United Provinces where village courts presided over by village munsifs have already existed for some years, these courts are still in an experimental stage.

Madras.

4. In Madras under the Village Courts Act, 1888 (Madras Act I of 1889), as amended in 1920 there are two classes of village courts:—

(1) courts presided over by village munsifs sitting singly for groups of villages or specified areas, and

(2) panchayat courts consisting of not less than five or more than 12 members elected by the villagers.

Since 1919 the policy of the Madras Government has been to set up a separate court for each revenue village and where panchayat courts are established they take the place of the older form of the village munsifs' courts.

5. The suits cognizable by these courts are:—claims for money due on contract or for personal property, or for the value of such property, when the debt or demand does not exceed in amount or value *the sum of Fifty Rupees* whether on balance of account or otherwise: provided that no action be brought in any such court.

(1) on a balance of partnership account unless the balance shall have been struck by the parties or their agents;

(2) for a share or part of a share under any intestacy or for a legacy or part of a legacy under a will;

(3) for rent of land unless such rent be due on a written contract signed by the defendant;

(4) by or against Government or public officers in their official capacity;

(5) by and against minors or persons of unsound mind.

With the written *consent of both* parties executed before the court, a village court may hear and determine suits of the nature described above, *the amount or value of which does not exceed two hundred rupees.*

The jurisdiction of village courts is *concurrent with that of the District Munsif.*

6. Suits can only be instituted in courts within the local limits of whose jurisdiction *all the defendants* at the time of the commencement of the suit *reside* or carry on business or personally work for gain. The courts are authorised incidentally to determine matters not cognizable by village courts but their decision on a title, legal character, contract or obligation will not be evidence in any other action.

7. Though the district munsifs have concurrent jurisdiction with the village panchayat courts, it is provided that if a suit which is triable by a village court is instituted in the court of a district munsif he may, unless sufficient reasons exist to the contrary, transfer it to the village court. "Where a district munsif tries a suit which is triable by a village court and is of opinion that the suit ought to have been instituted in the village court, no costs shall be allowed to a successful plaintiff, and a successful defendant shall be allowed his costs as between pleader and client." The district munsif may on the application of any of the parties withdraw any suit from a village court and try the suit himself as if it had been instituted in his court or transfer it for trial to any other village court within the local limits of his jurisdiction and pending disposal of any application for transfer the district munsif may order the stay of the proceedings in the village court. The district munsif has also the power under section 73 of the Act to set aside a decree or order of the village court "on the ground of corruption, gross partiality or misconduct of the village court; or of its having exercised a jurisdiction not vested in it by law, or otherwise acted illegally or with material irregularity, or that the decree or order is clearly unjust; and may pass such other decree or order as he thinks fit."

The safeguards thus provided, conferring on the district munsif the power to transfer suits, and mulct in costs the party unnecessarily seeking his remedy in the district munsif's court, are intended to induce parties to resort to village courts even though they have no exclusive jurisdiction. The district munsif's wide authority to revise the village courts' proceedings is expected to act as an efficient check on the vagaries of erring tribunals.

These courts have in execution matters power to execute their own decrees but only against movables. If execution against immovable property is necessary the matter must be referred to the ordinary courts.

8. We understand that the policy of the Government has been to foster panchayat courts and that instructions have been issued to the effect that the creation of a separate panchayat court for each single village should be the rule and that a court for a group of villages should be the exception. Where it may not be possible to constitute a separate panchayat court for a single village, the village should generally depend upon the village munsif for the trial of petty suits. The number of village courts in 1922 actually exercising civil jurisdiction was 7,755 and the number of panchayat courts 2,182.

9. The number of suits before the courts in the years 1920 to 1922 is given in the following statement:—

Year.	Number of suits for disposal.		Number of suits disposed of.	
	Village Munsif's Courts.	Panchayat Courts.	Village Munsif's Courts.	Panchayat Courts.
1920 . . .	109,635	..	98,934	..
1921 . . .	104,809	33,463	94,149	28,005
1922 . . .	98,791	107,760	88,664	90,865

Reviewing the Village Courts report for 1922 the Madras Government observed that it noted with satisfaction that village panchayat courts are by affording substantial relief to civil courts and by dispensing speedy justice in simple cases, gradually laying claim to be useful institutions and a request was made to the High Court to instruct district munsifs to exercise freely in suitable cases the powers of transfer under the Act of suits in their own files to these courts.

In its report for the year 1922 the High Court, observed: "The rise in the number of suits instituted is almost striking and so far as

it represents suits that would otherwise have been filed in village or regular courts satisfactory." "The paid tribunals have been relieved only to the extent of one-fourth of the work turned out by the panchayat courts. It is hoped that this relief will increase from year to year." "As regards small cause suits there was a marked fall, the number instituted being 140,585 against 165,683 in 1921." The decrease in institution (in the district munsif courts) is everywhere "attributed to the popularity of the new panchayat courts and their enhanced jurisdiction as compared with the old village courts."

10. Thus though the jurisdiction is only in suits not exceeding in value Rs. 50 and is not exclusive, directly panchayats with elected members replaced the village courts presided over by village munsifs (or headmen), rural tribunals increased in popularity and attracted more than 25,000 suits from the regular courts in less than two years. The opinion of the many witnesses examined in Madras is that these panchayat courts will increase in popularity, and are likely to be resorted to more largely by the small suitors and afford enormous relief to the regular courts if their pecuniary powers be increased and they are given exclusive jurisdiction.

Burma.

11. In Burma, a Headman has been appointed in each village. In a minute drawn up by Sir Charles Crosthwaite in 1890 the two objects he had in view in framing the Village Regulation of 1887 were stated by him to be "to preserve the village system which in Burma, as in India, has been the basis of indigenous administration from time immemorial; and secondly by using the village system to arm the Government with sufficient powers of dealing with the universal disorder which prevailed and could not be suppressed by the ordinary law even when backed by overwhelming military force."

12. The village laws of Upper and Lower Burma were amalgamated by the Burma Village Act, 1907 and the power of appointing selected headmen to try petty civil cases and to exercise enhanced criminal jurisdiction in criminal cases was reserved to the Local Government. Section 6 of the Act runs as follows:—

(1) "The Commissioner may, by notification, invest any headman with the powers of a civil court for the trial of suits between persons of whom both or all, as the case may be, reside within the village tract and may, by general or special notification, specify the classes and the value, not exceeding twenty rupees, of the suits which such headmen may try."

(2) "In any suit tried in exercise of such powers the decision of the headmen shall, subject to revision by such authority as the Local Government may appoint in this behalf, be final."

(3) "Notwithstanding anything contained in the Code of Civil Procedure a person shall not be bound to institute a suit in the court of a headman."

(4) "A fee shall be paid on the institution of a suit in the court of the headman at the following rate:—

	Rs.	A.	P.
If the value of the suit is Rs. 10 or less . .	1	0	0
If the value of the suit is more than Rs. 10 and not more than Rs. 15	1	8	0
If the value of the suit is more than Rs. 15 .	2	0	0
If the suit is a matrimonial suit or otherwise not capable of valuation	2	0	0

The township officer has been appointed to be revising authority and the headman is entitled to retain the fee above mentioned.

Section 29 provides for the making of rules prescribing the procedure to be observed by a headman trying a suit, the record which he is to make of the suit and the mode in which the record is to be disposed of, the powers which he may exercise as regards costs, the manner in which a decree or order made by him may be executed by himself and the manner, circumstances and conditions in and on which a decree or order may be sent for execution to and be executed by another headman or a civil court.

The rules made in accordance with that section provide a simple procedure with regard to pleadings, examination of witnesses, passing of decrees and their execution by attachment and sale. The jurisdiction is only concurrent but there is no statutory limitation about the classes of suits triable by these courts.

13. Proposals are now before the Burma Legislative Council for substituting as the judges of these courts a Village Committee of four elected members with the headman as president and enhancing the pecuniary jurisdiction to Rs. 50.

14. From the Resolution on the reports of Village Administration in 1920 it appears that the number of headmen invested with powers of a civil court under section 6 of the Village Act was 2,238 as against 2,072 in 1919 and 1,296 in 1918. The extent to which these powers were exercised varied from district to district, according to the character of the headmen. (In 1923 the number of suits disposed of by headman amounted to 6,461.) The resolution concludes with the remark that the village system is adapting itself in a remarkable manner to the progressive spirit of the times and village headmen, taking them all in all, displayed a public spirit which augurs well for the future development of Local Self-Government in Burma.

15. Witnesses who appeared before us in Rangoon were in favour of village headmen, assisted as they will be by the local committee under the amended Act, being invested with exclusive jurisdiction to try civil suits, some recommending the enhancement of the pecuniary jurisdiction to Rs. 150, while the trend of opinion on the whole was for fixing the jurisdiction at Rs. 100. Whatever opinion the people entertained about headmen, they seem to have confidence in the impartiality and fairness of the local committee.

United Provinces.

16. In the United Provinces village munsifs are appointed under the Village Courts Act of 1892 and Honorary Munsifs (who can only try cases transferred to them by the District Courts) under Act II of 1896. Recently the United Provinces Village Panchayat Act XII of 1920 abolished the courts of the village munsif in any district or part of a district to which the Local Government decides to apply the Act. Village panchayats are being established to assist in the administration of civil and criminal justice and also to effect improvements in the sanitation and other common concerns of villages. According to the Act a panchayat shall consist of such numbers of panchas (members) not being less than five or more than seven as the Collector may from time to time in each case think suitable.

The panchas, however, are not elected as in the case of Madras and Burma: they and their president are appointed by the Collector who can also remove them for neglect or misconduct.

The class of suits cognizable by the panchayats are the same as in Madras, but the pecuniary jurisdiction is fixed at Rs. 25, enhanced powers being given to selected panchayats to hear and determine suits of the value not exceeding Rs. 50. Unlike the system under the Madras and Burma Acts the panchayats in the United Provinces have exclusive jurisdiction to try suits within their cognizance, and no court can take cognizance of any suit cognizable by them unless or until the Collector cancels their jurisdiction or quashes the proceedings. Provision is made in the Act for the procedure to be observed with regard to the pleadings, service of summons to the defendants and witnesses, and passing of decisions. As in Madras no legal practitioner is allowed to appear on behalf of any party before them and it is the duty of the panchayat to ascertain the facts of every suit or case before it by every lawful means in its power and thereafter to make such decree or order with or without costs as to it may seem just. In so doing it shall be bound by no laws of evidence or procedure other than the procedure prescribed under the Act. The decrees are final, subject to a provision which empowers the Collector of his own motion or on a reference by a panchayat to cancel the order or decree or quash the proceedings of the panchayat. The execution of the decree is also through the Collector on a certificate received from the panchayat that the decree remains unsatisfied in whole or in part.

17. The work actually turned out by village munsifs was small and they do not appear to have been popular. Village munsifs are a dying institution and it is intended they should be gradually replaced by village panchayats. Their ordinary jurisdiction is Rs. 20 and with consent of parties it can be extended to Rs. 200. There were only 180 village munsif courts in the Province of Agra of which only 110 were actually working in 1922 and these courts disposed of 8,794 suits. In Oudh there were 43 village courts during the year as against 74 in the previous year. Twenty-seven village courts ceased, because of their having been absorbed in the

panchayats constituted under the new Act. 1,382 suits were instituted in the village courts but they had less work, hearing on the whole only 1,721 cases against 4,816 in the previous year. The fall is attributed to the establishment of village panchayats.

18. Witnesses who appeared before us were of opinion that if the panchas and sarpanch were carefully selected and appointed these panchayats could be given exclusive jurisdiction even up to Rs. 100, though the Act provides the upper limit of Rs. 50. Mr. Justice Mukerji is of opinion that the new system of village panchayats may be given a fair trial as justice will be there administered by not one man but by several. Mr. Burn in his statement before us observed about these panchayats:--

> "I have great hopes that they may be a success in the future. In one district in these Provinces a special manager of Court of Wards estates has been extremely successful in organising panchayats to deal with matters arising in the estates' villages. His success has been such that proposals made by him to abolish rent collectors has been approved as the panchayats are now responsible for collecting rent and paying it into the estate. These panchayats have been for some years settling a large number of cases which might have come before the courts."

Punjab.

19. In the Punjab, the Village Panchayat Act III of 1922 provides for the constitution, establishment, meetings and jurisdiction of panchayats. The panchas and sarpanch are to be elected. The Local Government may by notification confer on the panchayat judicial functions both criminal and civil. Exclusive jurisdiction is provided for to hear and determine classes of suits of the same nature as in Madras and the United Provinces when the debt, demand or compensation claimed does not exceed fifty rupees; and no decree or order passed by the panchayat shall be subject to appeal, revision or review at the hands of any court or other authority. Thus there is a finality to the decisions of this tribunal. A decree not passed unanimously may, however, be revised by a joint panchayat composed of the deciding panchayat and one of a neighbouring village. The procedure in the trial of cases is made as simple as possible and provision is made for rules being framed for regulating the mode of executing the orders or decrees of these panchayats. Of the witnesses who appeared before us some had no experience of the working of these panchayats and others recommended the grant of powers ranging from Rs. 50 to Rs. 250, if the panchayats were properly elected. The Act itself came into force in 1922 and no information is available about the number of panchayats constituted or the work done by them.

Mr. Calvert, the Registrar of Co-operative Societies; realising that litigation was a curse in the Province and a source of great economic loss as well the frequent origin of serious crimes, formed arbitration societies designed to organize public opinion in favour

of the settlement of disputes by arbitration without the intervention of court. These societies met for a time with a remarkable measure of success. In 1922 there were 148 societies with 16,628 members. Many of the cases decided by the society related to cattle trespass and boundary disputes, trivial matters which, however, often lead to riots and expensive civil suits. The money-lender and trader also took advantage of these societies to have their claims amicably and inexpensively settled in the village instead of undergoing all the trouble and expense of getting a decree in the regular court and executing it. Moreover the claims when decided by the society were usually settled promptly, for the award had the public on its side. But the organisation of these societies has apparently now been stopped since the new Panchayat Act was passed.

Having regard to the success achieved by the arbitration societies above referred to, there is every reason to think that the Panchayat Act, if worked properly, will in due time be useful in affording relief to the stipendiary courts.

Bihar and Orissa.

20. The Bihar and Orissa Village Administration Act III of 1922 provides for panchayats to be elected from among the members of a Union Board or in non-union areas by the residents of what is known as panchayat circles. These panchayats have exclusive jurisdiction to try the same classes of suits as are taken cognizance of in Madras, the United Provinces and the Punjab, when the value of the suits does not exceed Rs. 25, but a panchayat may be specially empowered to try suits of the value not exceeding Rs. 100 and rent suits up to Rs. 25 in value. The panchayats have jurisdiction up to Rs. 200 and in rent suits up to Rs. 25, concurrent with the ordinary courts. It is also provided that if the defendant objects to the suit being tried by one panchayat it may be transferred to another panchayat, and the civil court has power to transfer a suit before it to a panchayat. Special powers are provided for aboriginal panchayats to hear and determine certain suits for succession and partition among the members of the aboriginal tribes. Provision is also made for the payment of a small graduated fee by the plaintiff which is recoverable with the decretal amount from the defendant. The Act has apparently not been put into operation. Some witnesses were of opinion that small cases could be safely entrusted to village panchayats constituted under the Act. These courts have power to execute their own decrees against moveables only.

Central Provinces.

21. In the Central Provinces, under Act V of 1920, whenever a panchayat is established, the deputy commissioner may appoint all or any of the panchas to be a village court with exclusive jurisdiction up to Rs. 50 in the classes of suits already mentioned in connection with the Acts in Madras and the United Provinces and, by special notification or with the written consent of the parties, with jurisdiction up to Rs. 100. The panchas and sarpanchas are to be

elected and the provisions regarding the procedure in the trial of suits are much the same as those prescribed in the enactments already referred to, but decrees can only be executed by the deputy commissioner. The majority of the witnesses are of opinion that village panchayats with exclusive jurisdiction to try and determine small suits are likely to be greatly appreciated and to afford relief to the existing courts and suggest extension with regard to the classes of suits to be tried and the pecuniary value of the same. Some witnesses desired to have suits of the value of Rs. 200 or even Rs. 500 tried by the panchayats.

Bombay.

22. In the Bombay Presidency attempts were made to use panchayats in the regular administration of justice since 1802 but the system proved a failure and was definitely abolished in 1861. In 1875, Mr. (Sir William) Wedderburn, then district judge of Ahmednagar, proposed to appoint arbitration boards or panchayats in place of courts presided over by the headmen. But the form which legislation subsequently took in the Deccan Agriculturists Relief Act, 1879, was that in selected areas village courts presided over by headmen could be given exclusive jurisdiction in small money suits only up to the value of Rs. 10. The village courts so constituted are still in operation in four districts. Mr. Allison one of the witnesses examined in Bombay said that the headmen did their work without delay and they disposed of about one thousand suits a year in his district. He was of opinion that the jurisdiction of these courts could be increased to Rs. 20 or Rs. 25. Judging from the evidence as a whole there does not seem to be any educated public opinion supporting any large enhancement of the powers of these village headmen, almost all the witnesses who were in favour of an extension of jurisdiction, suggesting an upper limit of Rs. 25.

Bengal.

23. In Bengal under the authority of the Village Self-Government Act, 1919, Union Courts for the trial of the same class of suits as in Madras can be constituted, the members of which are chosen from among the members of the union board by the Local Government and hold office for only such period as they are also members of that body. Their pecuniary jurisdiction extends up to Rs. 200 but the local small cause court or munsif is bound to withdraw any suit when its value exceeds Rs. 25 and may withdraw a suit of a less amount on the prayer of the defendant. The orders of the courts are subject to revision by the District Judge only. Pleaders are not allowed to appear in the court. For the purpose of execution the court can give a certificate to the decree-holder who can then execute the same in the munsif's court. So far except in one or two districts very few courts have been established and we have not been able to obtain returns of the work that they are doing.

24. From the above account of the legislation already undertaken it will be seen that everywhere (except in Bombay) it is accepted that village panchayats with judicial functions should be used

for the disposal of small cases, varying in value from Rs. 25 to Rs. 200.

The recommendation we make is that in all the Provinces endeavour should be made to develop this system so as to withdraw all simple money suits of smaller value from the munsifs' and small cause courts, thereby relieving these courts of a large amount of petty work and make it possible for them to cope with the larger duties we think may be given them. In the course of our investigation we were told in the various Provinces by some witnesses that communal differences and factions are in the way of any further extension of the jurisdiction of these tribunals. There is some force in this objection, but it is in our opinion overstated. In villages where there are common interests to be protected, common services to be rendered and common funds to be administered, it is idle to ignore the common life of the village in which the necessities of neighbourhood have held their own or have prevailed against the divisions of caste. Those who have organised co-operative credit societies assure us that caste or communal differences do not in any way affect the success of the panchayats or committees of these societies which are composed of individuals of different castes as well as those who are outside the pale of caste. Whatever may be the operation of the factious spirit in the matter of social or religious institutions it has not, so far as we understand, affected the success of the co-operative movement in which members with unlimited liability work in harmony and punctually and promptly discharge their duties. Indeed wherever these co-operative societies are constituted the tendency is for their panchayats to adjudicate on local disputes and determine local quarrels and they do these things promptly and satisfactorily. In some cases, as time goes on, it may become possible to provide by way of safe-guard that in the election of panchayats the principle of proportionate representation may be employed.

25. When it comes to the trial of a civil dispute the interest in the subject matter is confined to the parties themselves and although parties would as a rule like the dispute to be decided by co-villagers they appear to have no objection to lay their disputes before respectable gentlemen in a neighbouring village whom they know as well as their own fellow villagers. The inclusion of panchayatdars from another village would frequently simplify the trial of suits in a village in which there is faction, if there be difficulty in finding there a panchayatdar who is not a member of one faction or another. To this end in the Punjab Act provision is made for the revision of decisions which are not unanimous, by joint panchayat of neighbouring villages. Moreover, it lies within the powers of the authority constituting a panchayat to group villages in such a manner as to ensure the return of representatives of different castes from different neighbouring villages, and by the exercise of this power factious spirit can be so reduced as not to be a determining factor in the discharge of the judicial duties of village panchayats.

26. Among the other advantages of village courts is the fact that they are close to the residence of the parties. The expense of litigation in them is negligible as pleaders are not allowed and witnesses have not to be brought from a long distance. There is not the same difficulty in seeing that the processes are duly executed and the fact that parties are speaking before their fellow villagers in their own village makes for a more easy determination of the truth.

27. In those provinces in which exclusive jurisdiction is not given, we recommend that opportunity should be taken to introduce it, as and when experience shows it will be safe. Unless exclusive jurisdiction is given to these courts they are not likely to be resorted to as largely as they ought to be, to be of the same use to the public, and to afford relief to stipendiary courts. The simple procedure of the village tribunal may not have the same attractions as the munsif's court to those who prefer the devious methods possible in a protracted trial. It may seem a harsh measure to compel a person to resort to judges who have no legal training. But the hardship thereby inflicted is more imaginary than real.

With the safeguards provided in every Act, there can be no hardship even in a case in which a suitor is on bad terms with all the members of a panchayat. The balance of convenience is certainly in favour of exclusive jurisdiction being granted to village courts. Exclusive jurisdiction may be given only to the courts which from past experience may be expected to dispense satisfactory justice. Consequently there is no reason to suppose that litigants will suffer hardship, but they will be benefited by the boon of cheap and ready justice at their doors. Exclusive jurisdiction should be guarded by giving the parties right to apply to the regular court for transfer to itself of any contested case.

28. If the jurisdiction be not made exclusive, cases will be taken to the ordinary courts and the cases that are so taken will be mostly the false or oppressive ones, in which the plaintiff wishes either to harass the opponent or to bolster up a false case by the evidence of suborned witnesses who would not support him in the village court. The removal of the concurrent jurisdiction of the munsif will be by far the most effective means of bringing the existence of the village courts into prominence and will prevent undesirable litigation. These, we take it to be the reasons, why some local legislatures in their recent enactments have provided for it.

CHAPTER 8.

Local Bars.

1. Intimately connected with the reforms necessary in all the mofussil courts is reform of the agencies which play a very prominent part anterior to the actual hearing of a suit. In rural areas there is often a busy-body who acts as the village lawyer and in the majority of cases is a tout. There is also the professional or amateur writer of documents who is responsible for most of the conveyances in towns and villages. The productions of these document writers frequently if not generally raise difficult questions of construction, the true intention being sometimes hopelessly obscure. In addition to these there are in and around courts petition writers who with the tout and document writer play no insignificant part in shaping litigation before a party seeking the aid of the court proceeds to the professional lawyer. Ultimately, however, the responsibility of shaping and conducting a party's case rests with the mofussil pleader.

Bar Committee's recommendations.

2. An examination of the present conditions of the Bar in India has recently been made by the Indian Bar Committee and in its report certain proposals have been made for the removal of the distinctions at present existing between barristers and vakils and for the better training of the vakils practising in the High Courts in this country. Paragraph 9 of the Report sets out at length the qualifications required at present for the admission of vakils to practise in the High Court and it will be convenient here to reproduce it.

"The qualifications required for admission as a vakil in Calcutta are the degree of Bachelor of Arts or of Science followed by the degree of Bachelor of Laws and two years' service as an articled clerk to an approved practising vakil of five years' standing. The period may be and usually is reduced by the court and may coincide with the period during which the student is reading for his law degree. The possessor of a law degree in an Indian university may also be admitted if he can prove four years' *bonâ fide* practice as a pleader in a subordinate court. Three years' service as an attorney of the High Court is also a qualification. But in every case the candidate is required to pass an examination, mainly in procedure, before the Judges in chambers though we understand that it has been little more than a formality in recent years.

"In Bombay a matriculate of the Bombay University or an attorney can be admitted by passing an examination, prescribed by the High Court, and a Bachelor or Master of Laws is eligible without further qualification.

"In Madras a Bachelor of Laws of the Madras University is admitted as a vakil after passing an examination in procedure and

practice (this requirement being waived if the candidate has served for three years as a subordinate judge* in the presidency) and serving one year's apprenticeship with a practising advocate, vakil or attorney of the court. In all cases the candidate must attend an approved course of lectures on professional conduct and etiquette. A Bachelor of Laws of Allahabad or Calcutta is also admitted after a similar apprenticeship. A Bachelor of Laws who has practised for five years as a pleader in the courts of a district or subordinate judge may also be admitted as a vakil.

"In Allahabad the rules admit a holder of the degree of LL.B. of the Allahabad University or B.L. of the Calcutta or Madras University, to be enrolled in the High Court as a vakil. There is also a test of the applicant's knowledge of the vernacular. But a vakil is only allowed to practice in the High Court after two years *bonâ fide* practice in the subordinate courts.

"In Patna the qualifications are the possession of the degree of B.A. or B.Sc., together with the B.L. or LL.B. of an Indian University, and two years' service as an articled clerk under an approved practising vakil of the High Court. A pleader holding a degree of B.L. who has practised for four years in a subordinate court may also be admitted. Three years' service as an attorney of the High Court also qualifies. But in every case the candidate is required to pass an examination in law and procedure prescribed by the High Court, and in certain cases a language test in Hindi is required.

"The Lahore rules admit English, Scottish and Irish solicitors, vakils or attorneys with three years' practice in Chartered High Courts who pass an examination in the Revenue Law, Procedure and Customary Law of the Punjab, and persons who have obtained honours in law at the Punjab University. Second grade pleaders of two years standing if they are Bachelor of Laws of the Punjab University, of three years standing if they are Bachelor of Laws of another university, and of five years' standing if they are without a law degree, may also be admitted.

"In Rangoon the qualifications are the degree of Bachelor of Laws of the Rangoon University, or of the Calcutta University if the candidate has passed in Buddhist Law and Burma local laws, followed by three years' practice as a second grade pleader or advocate. As an alternative to the degree in law a candidate may present himself for the first grade pleaders' examination. Solicitors of the United Kingdom are also admitted as first grade pleaders."

3. The Indian Bar Committee did not, however, describe at any length the different varieties of legal practitioners who practise in the subordinate courts throughout India. It remarked "We have noticed a general tendency towards unification of these grades and the gradual disappearance of the practitioners of low qualifications whose practice is confined to the lowest courts. This tendency is one which, in our opinion, is wholly beneficial, and we look to the

* The words should be "Judge of a Civil Court."

time when there will be in each province a single grade of practitioners entitled to appear in all courts, from the High Court to the lowest revenue court. But the various provincial systems and the local conditions which they reflect vary so widely that we are satisfied that any attempt to legislate for these subordinate grades of practitioners on any but provincial lines must be doomed to failure. We content ourselves with expressing the opinion that the disappearance of these grades is an ideal which should be kept prominently in view of whatever authority may be vested with the control of the Bar in each province."

4. Accordingly the Committee, in recommending the establishment of Bar Councils, proposed to confine their membership to the highest grade of legal practitioners, that is, to those who are advocates of the High Courts and proposed that all other legal practitioners should continue as at present to be enrolled and controlled by the High Court. At the present day, though in all the provinces a certain number of barristers and others having a right of audience in the High Courts practise as a matter of fact in the district courts, the large majority of those practising in the district courts are pleaders and other legal practitioners of the lower grades.

Training of Legal Practitioners in Subordinate Courts.

5. Our enquiry being directed to civil justice only, we are not concerned with muktiars who practise mainly in the criminal courts in the north-eastern part of India and revenue agents who practise in the revenue courts. The remarks which follow relate only to civil court pleaders. The chief qualification throughout India is at present the attainment of a degree of a Bachelor of Law without any further examination and without any necessity for studying in chambers before obtaining permission to practise. In Bengal there used to be an examination conducted by a Committee appointed by the High Court for the examination of persons who had not obtained the B.L. degree for admission as pleaders. This examination was abolished two or three years ago. A similar examination, however, still exists in Madras and some of the other provinces. But the tendency has been more and more to rely solely on the University examinations as a test for admission to practise at the Bar. In practice, however, it appears that though Universities may and in places do give an extensive education in the study of law, rules of procedure are not fully taught. In any case this part of legal education is not conducted on such practical lines as to give the young pleader when first joining his profession the necessary equipment for the conduct or preparation of cases. We would also remark that the mere passing of examinations is not by itself a sufficient test of ability to conduct a case.

6. This is abundantly proved in practice. The delay in litigation commences in the stages prior to the actual hearing but after the defendant appears. There is a sad want of preparation of cases before and after the institution of the suit. We have received complaints that cases are prepared in an unmethodical

manner, inspection of documents is rarely made, irrelevant matter is most inadequately excised and the courts get far less efficient assistance than they should. Clear instructions, complete copies of documents and carefully drawn proofs of evidence are not taken. The Orders and Rules relating to admission, discovery and interrogatories in the Civil Procedure Code are practically a dead letter in the mofussil. Pleadings are too often drawn up in a haphazard manner and issues settled by the adoption of what are called draft issues which often are merely repetitions of various paragraphs in the plaint and written statement. In cases in which a large number of documents relating to custom, to the history of an impartible Raj or to complicated accounts have to be examined and understood, there is a roving enquiry as to what exactly is relevant or useful. Even counsel conducting the case, though brought from presidency towns at a high rate of remuneration, have in some Provinces frequently to wait before a case can be said to be actually ready for methodical disposal. Pleaders on both sides often pick up their real case as they go along. When a senior practitioner appears, he often finds that the records contained in the bundle of papers presented to him are arranged on no definite principle or order. The copies of pleadings and of material documents as well as of the orders passed on interlocutory applications are so imperfect that it is not possible with any certainty to ascertain before the actual trial which of the various documents filed on each side are admitted by the other and which require proof by oral evidence. No sifting of the case for the purpose of excluding irrelevant matter takes place in many cases before the first witness is placed in the box.

7. We do not wish to be understood to pass a wholesale condemnation upon the manner in which business is transacted in mofussil courts which attain very different degrees of efficiency in different places. We realise that during the last thirty years matters have much improved and a fairly high level of efficiency can frequently be reckoned on. The fault is not by any means the mere fault of the practitioners and much of the difficulty arises from the poverty and illiteracy of clients and other circumstances. But a large part of the evil is attributable to the system under which any person who passes a university examination or a High Court test is admitted without any previous training in conveyancing, in drawing up pleadings or in the ordinary practice and procedure of the courts. In many of the provinces the university examination does not test the knowledge, theoretical or practical, of a candidate in procedure. The subject of conveyancing is not one included in the curriculum of any of the universities. The result is that a new entrant has to pick up his knowledge of practice as he goes along at the expense of the public. Such a state of things is not conducive either to the speedy and efficient despatch of business in the courts or to the material advantage of the litigant. Though the standard of education has been raised and though practitioners of the present day have to

undergo a fairly stiff examination in law, yet *practical* tuition has hardly so far been attempted. The new practitioner fresh from college has therefore more or less to depend upon the pleader's clerk in drawing up plaints and written statements and a beginning thus made is not likely to lead to any intelligent or business-like understanding of his professional duties.

8. As already noted several of the High Courts have established a system requiring those who wish to practise as High Court vakils to read and work with a vakil as articled clerks or apprentices or to spend some years in previous practice in the district courts. While we do not disagree with the Bar Committee in holding that the ultimate aim should be to level up lower grades of practitioners so that all should have the same qualifications as, and be part of one Bar with, those entitled to practise in the High Court, we consider that this ideal cannot be attained easily or quickly and indeed it may well involve some modification of the system at present obtaining in certain of the High Courts. To require every new mofussil pleader to repair to the capital of the province in order to read with a High Court vakil would appear to involve unnecessarily a large addition to the cost of a mofussil lawyer's education. We think that no reform is more urgently required than that which would provide for a district court vakil's articled clerkship in the mofussil being made a condition precedent to the right to commence practice in the subordinate courts. As the proposals of the Indian Bar Committee for the establishment of Bar Councils have not yet taken shape in practice the present is a somewhat awkward time for suggesting far reaching changes in the rules regulating the profession. That we touch upon this matter at all is only because at every stage of our inquiry we have been impressed with the futility of expecting efficient preparation of cases in the absence of adequate special training for the purpose.

9. We recognise that there may be difficulty, especially at first, in persuading a sufficient number of pleaders of good standing and with substantial practice to take as pupils new entrants into the profession. At present when junior pleaders in the subordinate courts do obtain the advantage of reading with a senior, it is very generally due to their connection with the senior by relationship or otherwise. We agree that unless the proposal has the backing of public opinion at the District Bar or at least of those who are in the active exercise of their profession it will not be practicable to introduce it with satisfactory results. We think, however, that in none of the provinces would the proportion between the number of senior pleaders in good practice and the number of new candidates make it really impossible, provided that the maximum period required for this form of training was limited to six months. The conditions upon which such a system should be established require careful consideration in detail. We think that the arrangement ought to be that the senior should be paid a reasonable fee by the entrant for the privilege of being allowed to read in his chambers and learn his profession. This undoubtedly means an addition both

to the cost and to the length of the legal education of those who in the future propose to join the Bar. This circumstance will doubtless evoke considerable opposition but in the long run it is to the advantage of any one who proposes to undertake the duties of a pleader that he should not do so without due training and sufficient experience. The advantage to the litigant and to the court is equally manifest. The present position is that judging merely by the possibility of reasonable success in the profession far too many of our educated youth *drift* to the Bar. No recommendation to cope with the unsatisfactory state of business in our courts can in our opinion achieve any great improvement if the question of the practical training of the members of the mofussil Bar is not grasped firmly and dealt with seriously and soon.

10. As a matter of principle senior members of the Bar in the mofussil should, we think, be called upon to take a substantial share in the training of their juniors. So far as the training in the preparation and conduct of cases is concerned only a practical man with experience can give very useful tuition. We do not see why under the auspices of District Bar Associations senior practitioners should not be expected and invited to give and to organise lectures and instruction on subjects such as conveyancing, pleadings, discovery and generally on the preparation of a suit for trial. It might have a very good effect upon mofussil Bar Associations if they were invited to do definite work of this character. Some doubtless might refuse and others might not be very successful. In many places, however, we think it would work fairly well especially where a few of the leading practitioners are men of real public spirit.

Remuneration of Pra[redacted]ers in the Mofussil.

11. Closely connected with the way in which business is transacted in the mofussil is the remuneration which is now paid *ad valorem* on a scale which, though fair perhaps three decades ago, is now very unsatisfactory. In light cases there is more than adequate remuneration and in heavy cases the remuneration is not at all commensurate with the labour bestowed either in the preparation or in the argument of the case. Further, the scale now fixed does not pay the senior practitioner for the work he is expected to do under the various Orders and Rules of the Civil Procedure Code. If we are to insist upon every preliminary being strictly complied with we should also recast the scale of remuneration that is prescribed under the rules framed by each High Court. In heavy cases one practitioner cannot do all the work and he has to be assisted by juniors. At the present time the fee that is prescribed is a single fee calculated on an *ad valorem* basis and does not enable the senior to remunerate his junior sufficiently. Nor is it right that juniors should be paid by seniors.

12. As observed by the present Chief Justice of Madras: "A case involving a large sum may be defended merely to gain time,

and when it comes to trial go through practically as an undefended case, casting no burden of work on the plaintiff's vakil, and yet he gets a heavy *ad valorem* fee allowed against the other side. On the other hand, a difficult and complicated suit may entail elaborate preparation, may raise a question of vital importance and yet, because the actual sum of money at stake is small, may carry with it a trivial fee recoverable from the losing side. Worst of all, there is a maximum vakil's fee of Rs. 1,000 for profit costs, which cannot be exceeded: and may apply to a case which has involved months of careful preparation, and has perhaps occupied several days at the trial.

"All this matters little to the vakil in assured practice. His fee as between himself and his client he fixes without reference to the *ad valorem* scale, but according to the amount of work he expects to have to do in the case though, of course, the *ad valorem* fee allowable is naturally his minimum. But it works out in practice that no vakil of any standing in the court will take up a case at any figure that is not far in excess of the *ad valorem* fee recoverable from the losing side. This is obviously unjust to the client who has to pay fees which are a reasonable remuneration for the work done, but a large portion of which he cannot hope to recover from the other side. And, of course, the vakil in large practice has to keep up an office and a staff of juniors to get up his cases for him. He charges his client with a fee which covers a proportion of these matters; not one rupee of that part of his fee is recoverable from the other side. It is said that some junior vakils are content to appear for *ad valorem* fees, because it levels itself up: while they are underpaid for what they do in some suits, they are overpaid in others. That may be well enough for them, but it is no consolation to the losing [redacted] in the latter class of case."

13. In addition to the fee [redacted]ibed on the basis of valuation which now forms the remun[redacted]tion for the conduct of the whole suit it is necessary in our view to prescribe fees in the various stages of a suit, *e.g.*, in applications for injunction, the appointment of receivers, discovery and inspection, notice to admit documents, proceedings in execution particularly those relating to claim petitions, applications under Order 21, rules 90 and 97 and Order 22. Order 11, rule 3, provides for the costs of interrogatories and runs as follows:—"In adjusting the costs of the suit inquiry shall, at the instance of any party, be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the court, either with or without an application for an enquiry, that such interrogatories have been exhibited unreasonably, vexatiously or at improper length the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault." Order 12, rule 4, prescribes the procedure in cases of notice to admit facts. In case of refusal or neglect to admit any specific fact or facts mentioned in such notice the costs of proving such fact or facts have to be paid under this rule by the party so neglecting or refusing whatever the result of the suit may be, unless the court otherwise directs.

Rule 9 of the same order provides for the costs occasioned by an unnecessary notice to admit or produce specified documents which should be borne by the party giving such notice. Investigations under Order 21, rules 58, 90 and 97 and the hearing of applications for injunction or the appointment of receiver or the substitution of legal representatives on the death of parties often take a long time but the remuneration that is taxable in these cases is absurdly low and certainly not commensurate with the labour that has to be bestowed in such proceedings. In the various proceedings incidental to the progress of a suit certified copies have to be obtained and filed. Fair copies of the plaint and memoranda of appeal as well as affidavits and petitions have to be prepared and served on the opposite side.

14. No provision is now made for costs relating to these matters being taxed and included in the final order or decree so as to enable the successful party to recover the same from the losing one. It seems to be therefore a very desirable reform to revise at once the rules framed under the Legal Practitioners Act with reference to the remuneration of vakils, providing some method which will pay reasonably and justly for services rendered in the various stages and enable the appointment of juniors in difficult cases for a remuneration to be fixed by rule and not by the grace of the senior. In this matter it has to be remembered that the duty of a court in framing a scale of costs is to give to a successful party an adequate indemnity against the expense reasonably incurred by him in maintaining or defending his rights. An inordinate disparity between what a reasonable man feels obliged to pay to his pleader and the fee which he can tax and recover from his opponent gives room for great injustice. In our opinion it is clear that throughout India the rules framed for the remuneration of pleaders have become somewhat antiquated both in substance and method. They permit an unreasonable litigant to put his opponent to unreasonable expense without incurring the risk of being required in the end to give an adequate indemnity. We appreciate that the subordinate courts cannot be provided with taxing masters, but this fact is no sufficient defence of the present system.

Pleaders' clerks and their remuneration.

15. In the life-history of a litigation there is yet another important agency, namely, pleaders' clerks. These clerks ordinarily file in court on behalf of their masters plaints, written statements and other papers. They pay the process fee and transact small and incidental business to be done in the court's office. In mofussil courts most of the plaints, written statements, process memoranda and other documents are prepared in vernacular and pleaders' clerks take a considerable share in their preparation. In complicated matters rough drafts are first made by the clerks and are corrected by vakils before being presented in court. A pleader's clerk keeps and prepares copies of documents and does for the assistance of the pleader much of the work which a solicitor's office does in England. All kinds of practitioners depend much upon the

assistance so obtained. A clerk is generally paid a small fixed salary by his master but makes his real living out of payments by or exactions from the clients.

16. Suggestions have been made that some examination in law and procedure should be held by authority for pleaders' clerks. In Bengal for several years past and in Madras since recently there has been a system whereby a card is granted, after certificate, authorising one clerk or two clerks for each pleader to have access to the court and to transact business as a pleader's clerk in the court's office. This appears to be necessary for the prevention of touting and in the interest of pleaders themselves. Many pleaders employ as so called clerks several persons whose real function is not so much to do work for as to get work for their masters. The person who poses as a clerk can only be registered as the clerk of one pleader, yet may be busily engaged in finding work for several different pleaders. It is reasonable that before a clerk is registered the court should be satisfied of a reasonable standard of elementary education and of his honesty. We do not, however, consider it necessary or advisable that the Government or the High Courts should hold an examination into the knowledge of procedure or *quasi*-professional qualifications of clerks. It seems undesirable to give unqualified persons of this class a legal status so as in effect to introduce an untrained class of legal practitioners into the judicial system. The pleader himself must sustain the sole and direct responsibility both to the court and to the client.

17. The remuneration of clerks calls for some alteration in method. In Lahore a system is in force whereby they get a certain percentage of the fee. Throughout India, however, their living depends substantially on what they can get from the client. This system is eminently undesirable. It leads to many foolish cases and to much unnecessary expense and delay. It is much to be wished that Bar Councils when established will be induced to give earnest attention to this question and to submit proposals whereby registration as a pleader's clerk should be permitted only where the remuneration of the person to be registered has been arranged for on a reasonable basis. We are not as a Committee prepared to supplement what was said by the Indian Bar Committee by concrete proposals of our own.

Touting.

18. As regards touting the following observations of the Bar Committee are fully borne out by the statements of witnesses made before us:—

> "We feel that our report would not be complete without some reference to an evil which was brought prominently to our notice in the course of our enquiry. The evidence which we have received leaves no doubt that touting of various kinds prevails in most provinces of India. The law with reference to touting was strengthened in 1896

but has proved entirely ineffective. The plain fact is that unless the legal profession assists the courts to suppress touts little can be done by way of legislation.

" One of the principal causes of the existence of this evil is the serious overcrowding of the legal profession. Touting has undoubtedly increased with the increase in the numbers admitted. It would appear that in some provinces in the near future there will not be any necessity to retain the lower grades of legal practitioners. If the profession of the law is closed to all but those who have qualifications entitling them to practise in the High Courts and the qualifications of entrants are raised, the number admitted should not be excessive and it may be possible to enforce a higher standard of discipline.

" We trust that the Bar Councils will regard the suppression of touting as one of their principal concerns."

19. Section 3 of the Legal Practitioners Act defines a tout as a person who procures the employment in any legal business of any legal practitioner, in consideration of any remuneration moving from such practitioner or proposes to a legal practitioner to procure his employment in any legal business in consideration of such remuneration. Section 36 enables a High Court, district judge, sessions judge, district magistrate, presidency magistrate, every revenue officer not being below the rank of a collector of a district, and the chief judge of every presidency small cause court (each as regards their own or his own court and the courts, if any, subordinate thereto) to prepare and publish a list of persons who to their or his satisfaction, by evidence of general repute or otherwise, habitually act as touts, and may from time to time, alter and amend such lists; the court or judge may, by general or special order, exclude from the precincts of the court any person whose name is included in any such list. Every person whose name is included in any such list shall be deemed to be proclaimed as a tout. Section 13 (*e*) enables the High Court after such enquiry as it thinks fit to suspend or dismiss any pleader or muktiar who accepts any employment in any legal business from one who has been proclaimed as a tout under Section 36 and generally indicates the varieties of professional misconduct such as taking instructions from unauthorized persons and giving gratification for procuring or having procured his employment in any legal business of himself or any other pleader.

20. Notwithstanding the existence of these provisions and the fact that the employment of touts is the evident and immediate cause of many false claims and defences and of much waste of time in courts, little is done for the effective suppression of touting. In the first instance it would seem to lie with the members of the Bar themselves to see that the law is put in motion. Moreover, it is open to them to make persistent and unanimous efforts to ensure that no member of the Bar appears,

acts or pleads in cases brought to him by a tout. They can do much to help the court in making the lists of touts comprehensive and in bringing them up-to-date. Unfortunately, as matters stand their efforts in these directions are at best very occasional, spasmodic and unconvincing. Judicial officers on whom powers have been conferred by section 36 of the Legal Practitioners Act pay insufficient attention to this matter partly because of the difficulty experienced in trying to enforce the section especially when the court has attempted to act on its own motion.

21. There is a considerable amount of difficulty in arriving at a conclusion as to who is or is not a tout. As pointed out already, before declaring a person a tout, it is necessary to make an enquiry and give the accused person an opportunity of showing cause. A district judge cannot act under this section upon evidence recorded by a subordinate judge because the courts mentioned in this section 36 can alone make the enquiry. Before directing the inclusion of a name in the list of touts, it is necessary that a proceeding should be drawn up and strict proof required of general repute. It need hardly be pointed out that it is not always easy to determine what is evidence of general repute and what facts and circumstances should be taken to show that a person has acted as a tout. Where two witnesses admitted that their legal business was being looked after by a person chargeable with touting and muktiars said that they regarded him as a tout, it was held that such evidence was insufficient to justify an order declaring him a tout. It was also held that unless there was legal evidence to show that he was a tout or that he was reputed as such, the report of the Bar Association was insufficient. The rulings of the High Courts to the effect that the evidence should be definite and not vague have resulted in making it extremely difficult to bring any one to book.

22. It is in the circumstances essential to increase the powers of presiding judges in controlling touting. Some measure of reform must be devised whereby munsifs and subordinate judges may be enabled to act in the same manner as the district magistrate or the district judge. The listing may be done by superior officers as at present but power may be given to them to delegate the enquiry to the subordinate judicial officers also. The district judges may be empowered from time to time to send lists of names to the subordinate judicial officers under their administrative control in order that they may hold the necessary enquiry and decide whether the persons concerned are touts and should be listed as such. The recommendations of the Bar Association passed by a majority of not less than two-thirds of the members should also be capable of being received as evidence of repute. At present touts proclaimed in the list under section 36 are excluded only from the court precincts and are not thereby prohibited from pursuing their objectionable calling. We think that after being proclaimed, a tout who continues to act as such should be guilty of a criminal offence. The definition of " tout " in section

3 seems to us to require amendment so as to include the large class of people who in serais, railway stations and other places intercept prospective litigants in order for a consideration whether paid by the pleader or the client to take their business to particular legal practitioners.

CHAPTER 9.

Officers of Courts.

1. The courts of all grades in India have duties other than purely judicial duties to discharge. Every judicial officer besides deciding suits and other proceedings has necessarily to perform a certain number of quasi-judicial and administrative duties in connection with the suits and proceedings disposed of by him.

Broadly speaking, these duties relate to receiving and checking the pleadings, etc., seeing whether they satisfy the requirements of law; the preparation and issue of several kinds of processes; keeping of accounts of court-fees and other moneys paid into and out of court including the amounts of decrees; the administration of estates of minors, etc., who are wards of courts; and supplying certified copies to parties. In the case of district courts, there is the additional duty of supervising and inspecting the administrative and judicial work of courts subordinate to them.

The present system with slight local variations is for each court to do all these duties with a separate staff of its own. Only in the High Courts and the Presidency Small Cause Courts is there centralisation of offices and division of labour to any appreciable extent.

It will be instructive at the outset to study in some detail the constitution of a district judge's office so as to obtain a clear idea of the different departments into which it is divided and of the duties which devolve on each department. The nomenclature of the heads of the different departments varies in the different provinces and so do the details of the distribution of duties. But the following description may be considered as fairly typical for the whole of India.

2. The most important department in a district judge's office is what is known as the sherista or vernacular department, which is immediately concerned with registering the judicial orders of the court as distinguished from the department whence issue the executive and administrative orders of the judges. The sherista is presided over by an officer who is variously called the sheristadar, or munsarim or clerk of the court in different provinces. He is also the head of the entire ministerial establishment of the district court. The following is a detailed account of his duties:—

Sheristadar.

1. Examining plaints, memorandum of appeal, petitions in miscellaneous cases, verifications, accounts, etc.
2. Signing processes.
3. Preparation and examination of decrees, copies, etc.
4. Examining and signing chalans and payment orders.

5. Preparing and examining periodical returns and explanations.
6. Administering affidavits.
7. Examination and issue of sale certificates.
8. Inspection and supervision of the office.
9. Attending the presiding judge with reports, correspondence, etc., in chambers.

An officer of importance in the sherista is the peshkar also called the reader or bench clerk, who besides assisting the judge in the mechanical portion of his duties while sitting on the Bench has the following duties to perform:—

Peshkar.

1. Keeping diary, register of petitions, attendance of witnesses and court-fees.
2. Writing orders in order sheets.
3. Preparing headings of record.
4. Reading and explaining depositions to witnesses, etc.
5. Marking exhibits and arranging records.
6. (In some provinces) recording evidence.

Attached to the sherista are a certain number of muharrirs or clerks, the most important of whom is the execution muharrir who deals with execution petitions filed in court. His duties are as follows:—

Execution Muharrir.

1. Examining petitions with decrees.
2. Keeping registers.
3. Issuing notices, writs of warrants, etc., proclamations, sale certificates, etc.
4. Making over orders, etc., to nazir and receiving them back.
5. Examining and certifying payment orders.
6. Entering in order sheets.
7. Preparing periodical statements and explanations.
8. Insolvency proceedings.

The other muharrirs attached to the sherista have among others the following duties to discharge:—

Muharrirs.

1. Making entries in registers.
2. Examining records received.
3. Arranging disposed of records with indices for transmission to the record room.
4. Drawing up decrees.

5. Entering routine orders in order sheet.
6. Sending to and receiving records from the copying department.
7. Writing summons and notices.

3. Next in order comes the English department which deals principally with the English correspondence of the district judge's office. The head of this branch is called the head clerk and he is assisted by a certain number of clerks. The following is a detailed description of the duties of the head clerk and of the clerks in the English office:—

Head Clerk.

1. Drafting letters and comparing fair copies.
2. Checking periodical statements.
3. Looking after the library and posting up circulars.
4. Compiling returns.
5. Putting up correspondence to district judge for orders.
6. Keeping charge of wills.
7. Looking after renewal of pleaders', etc., certificates.
8. Receiving and distributing forms and stationery.
9. Examining and registering security bonds of ministerial officers.
10. Sorting out old correspondence and returns for destruction.
11. Translating documents.

Clerks.

1. Docketing and registering letters.
2. Making fair copies.
3. Looking up references and despatching letters, etc.
4. Compiling the periodical statements.
5. Helping the head clerk in compiling and comparing.
6. Preparing renewed certificates to pleaders.
7. Checking indents.
8. Keeping files of circulars.
9. Keeping registers of clerks, pleaders, etc.
10. Keeping stationery and forms.
11. Copying wills in the registers.

4. Next we have the office of the record-keeper and his assistants whose main concern is the sorting, preservation and destruction of the records of all suits and proceedings decided in the whole district. The following is a summary of their duties:—

Record-keeper and his Assistants.

1. Receiving records.
2. Filing papers received.

3. Examining records.
4. Re-punching stamps.
5. Inspection of records (record-keeper).
6. Certifying payment orders (record-keeper).
7. Sending records called for.
8. Receiving records on return.
9. Sending papers for copying.
10. Receiving papers on return.
11. Returning exhibits.
12. Arranging records to be replaced.
13. Testing the accuracy of replacing.
14. Sorting for destruction.

5. The accounts department which deals with court-fees and other moneys paid into and out of court including the amounts of decrees is a most important department and is in charge of an accountant in some provinces or of the sheristadar or nazir in others with a staff of assistants. The accountant and his assistants have the following duties to discharge:—

Accountant.

1. Checking figures and supervising entries in the registers.
2. Comparing and signing challans.
3. Comparing treasury advice lists.
4. Checking and signing payment orders.
5. Checking monthly and annual deposit returns.
6. Preparing plus and minus memoranda and abstract.
7. Preparing and checking salary bills, etc.
8. Checking budget estimates and pension rolls.
9. Drafting letters.

Assistant Accountants.

1. Putting up registers, etc., to judge in charge.
2. Receiving, filling up and entering challans, etc.
3. Posting the various registers.
4. Docketing and entering letters.
5. Totalling the account registers.
6. Faircopying bills.
7. Noting in service books.
8. Making copies of registers for Accountant-General.

6. Lastly there is the nazarat or the office of the nazir who is in charge of the cash in the hands of the court and is responsible for the serving of processes issued by the court. He has generally one

or two assistants. The following is a résumé of the duties of the nazir and his assistants:—

Nazir.

1. Conducting sale and keeping sale accounts.
2. Registering and dealing with intestate property.
3. Signing chalans in triplicate for money received in court.
4. Checking and comparing peremptory cash book.
5. Signing payment orders and getting court-fees attached.
6. Dealing with land acquisition cheques.
7. Keeping peons' register and distributing processes.
8. Looking after civil court buildings and furniture.
9. Dealing with the permanent advance and contingencies.
10. Making local enquiries into security bonds, etc.

Naib or Deputy Nazirs.

1. Taking attendance rolls of witnesses.
2. Keeping peremptory cash book and counterfoils.
3. Keeping contract contingent registers, etc.
4. Keeping register of processes and peons.
5. Keeping register of covers despatched.
6. Keeping register of money-orders received and issued.
7. Examining peons' diaries.
8. Keeping general cash book.
9. Registers of saleable forms, stationery and furniture.
10. Preparing indents.
11. Registering, receiving and despatching parcels.
12. Keeping register of travelling allowance bills.
13. Keeping register of Permanent Advance.
14. Checking diet money issued to peons.
15. Keeping the acquittance roll.
16. Examining diaries of peons.
17. Keeping accounts of service postage stamps.
18. Making local enquiries.

It may be added that in several provinces the nazir has to do duty as receiver of estates in litigation and as guardian-*ad-litem* of minor parties.

There are in Bombay a special class of officers of the grade of deputy nazirs who are entrusted with the management of the estates of minors under administration by the court. Their duties in this capacity will be described in detail in a subsequent chapter. They generally combine also the duties of the inspector of bailiffs, which will be described in the Chapter on "Process-Serving."

7. The copying department consisting of a staff of copyists, working under the supervision of a head copyist or a copyist

examiner or a translator as he is variously called, is also attached to every district court. The business of this department is to supply certified copies of documents to the parties. In some provinces the copyists are paid by fees and in others they receive a fixed salary. Copies are charged by the folio in some provinces, while in others a lump sum is charged for each copy irrespective of the number of folios, according to the class to which the original belongs. The copies prepared by the copyists are compared with the originals by a set of comparing clerks before they are certified to be true copies. In most provinces the copying departments of the several courts located in one place are being gradually unified so that it is possible to obtain copies of all documents of all the courts in the place from a central office.

In some provinces a limited number of probationers are taken for the purpose of learning their work. They also act in temporary and officiating vacancies. In some courts the number of such vacancies is so large that they get acting posts almost as soon as they join and before they have an opportunity of learning their work.

8. These are the broad lines on which the work of a district judge's office is carried on in almost every province in British India and Burma. The courts of subordinate judges at headquarters and in sub-divisional towns have also independent establishments of their own consisting generally of a sheristadar, a bench clerk and a certain number of other clerks. The courts of the several munsifs have also similar independent establishments of their own. Their duties are analogous to the duties of the corresponding ministerial officers of the district courts.

9. Complaints were made to us in some provinces that the ministerial establishments of the courts of subordinate judges and munsifs were so undermanned that the work of the courts was seriously delayed. The subject of the revision of ministerial establishments has, however, at some time or other been considered in most provinces by Committees appointed by local Governments, who have submitted their recommendations. We do not feel that we can express any useful opinion in this matter. All that we wish to say is that the complaint was loudest in the Punjab.

10. The pay and prospects of ministerial establishments vary in different provinces. Few of the members of the staff are graduates in arts, still fewer graduates in law. Except in Burma they are not eligible for promotion to judgeships. Charges of corruption have been freely made against them by witnesses examined before us; but they are undoubtedly exaggerated. The great majority of the ministerial staff are hard-working and capable. No doubt their power for mischief is considerable as it is in their hands to delay the progress of a suit or proceeding at every turn by taking purely mechanical and often unnecessary objections and in many other ways. It is no wonder that some of them succumb to temptation. But the tales of a regularised system of blackmail said to be practised by members of the ministerial establishments

of subordinate courts in some provinces seem to us to be somewhat fanciful. If they were true, it seems to us that action would have been taken by the witnesses who were generally responsible members of the Bar against the culprits by moving the proper authorities on the spot. Bar associations which have now been formed in most courts should be sufficiently powerful to check the evil where it exists.

Still it cannot be gainsaid that a certain amount of petty corruption undoubtedly exists amongst the subordinate ministerial staff of our civil courts. The only remedy we can suggest is to recruit clerks of higher educational qualifications and this can only be done by increasing their pay and prospects. A closer supervision by the presiding judge of the work of the ministerial officers by means of a systematic and periodical inspection of their registers and work will also be helpful. In Bombay passing a departmental examination in law and office procedure according to a prescribed standard is compulsory for confirmation of a ministerial officer and for crossing the efficiency bar so as to qualify for one of the appointments on the superior scale. In Madras a similar test has to be passed for promotion to the higher grades of the establishment.

11. We have said that, generally speaking, the several administrative duties are performed separately by the staff of each court, even though several courts of the same grade are located in one and the same place. In most provinces, however, a tendency towards amalgamation is gradually manifesting itself. Separate nazarats have been abolished and central nazarats established at district or sub-divisional headquarters in practically every province. There is also, as we have said, a tendency towards the unification of the copying department, so that copies of the documents of all courts situated in one place can be obtained from one central office. In one or two provinces tentative steps have also been taken to unify the sherista. Thus, in the Central Provinces, the sheristadar of the district court receives all the plaints and distributes them amongst the various subordinate judges and munsifs. Similarly in the Punjab and in Bombay the senior subordinate judge receives all plaints and distributes them amongst the various subordinate judges. In all the other provinces each officer has his own sheristadar, who receives plaints, checks them and lays them before the court. In some places where there is concentration of a large number of courts there are as many as ten or twelve different officers working in the same building attending to this duty.

12. The reason for this excessive decentralisation is the principle strictly enforced under the Civil Courts Acts in most provinces that all munsifs and subordinate judges should be invested with separate territorial jurisdiction so that their offices alone have jurisdiction to receive all plaints and suits instituted within that area. If, owing to increase of work, a new court has to be opened in a given area, the practice in those provinces is to split up the territorial jurisdiction and to create two or more entirely independent courts with a full separate establishment for each court. It seems to us that a sounder and more economical method is

the method followed under the Bombay Civil Courts Act, where in such a case additional subordinate judges or munsifs would be appointed who have no territorial jurisdiction of their own, but only try such cases as are made over to them by the permanent judge. We understand that a proposal to amend the Madras Civil Courts Act on these lines is before the local Legislative Council. It is a more economical method, because the additional subordinate judge or munsif would not require a separate sheristadar and the full complement of a subordinate judge's or a munsif's establishment, but only a peshkar and one or two clerks. It is a sounder method, because it recognises the principle of reduction of work by division of labour, as the work of receiving and checking plaints and issuing summonses can be done in one office for the different courts situated in the same place.

We understand that so badly is the present territorial system worked in certain parts of Bengal and Madras that one or other of the subordinate judges is usually overwhelmed with work while his colleagues have comparative little to do; so that in actual practice it is necessary for the district judge to intervene nearly every quarter and ignoring the so-called territorial jurisdiction to transfer cases from the file of one subordinate judge or munsif to that of the other. There is in some quarters an apprehension that unfairness in the distribution of work might be the consequence of the Bombay system; but nothing can be more unsatisfactory than the way the present territorial system works in causing an uneven distribution of work. The district judge, or if necessary, the High Court could easily lay down the general principles on which the work should be distributed and if any additional munsif or subordinate judge found that his file was unmanageable, he should be allowed direct communication with the district judge who after consulting the munsif and the other additional munsifs and looking into the state of the files could transfer as many cases as is necessary to equalise the files just as he does now. Fears were also expressed that the *amour propre* of the judges might be hurt and friction between them may result if every subordinate judge or munsif had not his own sheristadar. But it seems to us that there is no valid ground for any such apprehension. Each additional judge would have his own peshkar, who would be his chief ministerial officer for such purposes as the law requires.

We do not regard it as unreasonable that the lowest grade munsifs who would generally be appointed additional munsifs should not have any jurisdiction to receive plaints and should first learn to be judges before they seek to be administrators. The newly appointed and the junior munsifs would first serve their apprenticeship in those purely judicial functions for which their early training may be taken more or less to have fitted them and by watching the procedure of the experienced senior munsifs who would have administrative charge of the whole sub-division, they would gradually acquire administrative experience which would stand them in good stead when they themselves are promoted to be sub-divisional officers.

13. The principle which we here advocate is the principle that there should be one court of original jurisdiction whether of subordinate judge or munsif for a certain area and that whatever supplementary courts are necessary owing to increasing work should be courts of additional subordinate judges or additional munsifs, only trying such cases as are made over to them and requiring no special establishment but a peshkar and one or more muharrirs. As regards the distribution of work, the senior subordinate judge or munsif should have administrative charge of the sherista, the accounts, the nazarat and copying departments, the establishments of which with the exception of the sheristas are more or less amalgamated already. The senior subordinate judge or munsif would also be in charge of the execution department and execute all the decrees passed by the several officers of the same court. The experiment of having one execution court for all decrees passed by officers of the same class in the same place has been tried with very great success in Bombay in cities like Ahmedabad where two first class and four second class subordinate judges are generally posted to the subordinate judge's court. There are not nearly so many complaints here of delays in execution. The senior first class or second class subordinate judge devotes one or two days in the week exclusively for execution of decrees passed by the officers of the same class. Thus during the year 1923 there were in all 840 regular applications for execution filed in the court of the first class subordinate judge, Ahmedabad, out of which 117 were for the execution of decrees in special jurisdiction cases. The senior first class subordinate judge devoted generally one day per week to these special jurisdiction executions and the senior second class subordinate judge two days per week to the execution of all decrees passed by the second class subordinate judges. It is only fair that a smaller number of suits per month should be allotted to the judges doing execution work than to their brother subordinate judges who are able to devote all the working days in the week to civil suits.

14. If the courts at the district or sub-divisional headquarters are constituted on this basis, it would follow that the senior subordinate judge or munsif would be responsible for receiving, checking and admitting plaints and issuing summonses. He would also have administrative jurisdiction of the sherista, accounts, the nazarat, execution and copying departments. If this work is beyond the work of one man, he might with the sanction of the district judge ask any of his additional colleagues to help him with the inspection and supervision of any given department. But the general office establishment in all departments would be directly and entirely under him. If the work be excessive for one sheristadar, a joint or assistant sheristadar will have to be appointed, but on no account should the work of the sherista be split up and divided between the several munsifs or subordinate judges. The senior officer would also dispose of all the uncontested work according to an arrangement to be presently described. The contested work he would pass on to the additional subordinate judges or additional munsifs of whom

there might be any number, retaining a certain quantity in his own hands. The additional munsifs or subordinate judges would try all contested suits and do nothing else.

This proposal is independent of the proposal to appoint a registrar for a group of courts at sub-divisional headquarters which we shall discuss presently.

15. Next we proceed to consider the question of the administrative duties of district judges. These duties and the ministerial establishments provided for carrying them out have been described in an earlier portion of this chapter. Varied as these duties are and numerous as the heads of departments primarily responsible for their discharge, the ultimate responsibility for their due discharge naturally falls upon the district judge himself. The burden of the evidence of every district judge examined before us was that the administrative duties of his office take up an inordinate amount of his time, ranging from an hour to an hour and a half every day, with the result that the time left for his judicial work is seriously curtailed. Where judicial work is heavy, administrative duties are also most exacting.

16. So greatly was the High Court of Calcutta impressed with the waste of time and energy in accounts and other miscellaneous work done by district judges—time and energy diverted from judicial business—that in the year 1921 they pressed upon the Government of Bengal for the early creation of a new post at the head-quarters of districts to be held by an officer styled "Registrar," who would relieve the district judge of work connected with accounts and other miscellaneous business. The High Court sarcastically observed that the present system of turning possibly good judges into inevitably bad accountants was not good economy. And they recommended that the registrar who was to be appointed according to their scheme should be entrusted with the following functions :—

1. To deal with all questions relating to accounts and under the general supervision of the district judge to control the work of the office establishment at headquarters.
2. To see that plaints in important cases are properly stamped.
3. To deal with the work connected with the administration of the Insolvency and Guardian and Wards Acts, etc.
4. To try *ex parte* cases under the Succession Certificate Act, 1889 (7 of 1889), the Guardian and Wards Act, 1890 (8 of 1890), and the Probate and Administration Act, 1881 (5 of 1881), and
5. To audit accounts submitted under the various Acts, *e.g.*, Lunacy Act, the Bengal Tenancy Act, etc. He might also be entrusted with a limited amount of work connected with the periodical inspection of courts and offices.

The High Court was of opinion that as the proposed registrar would probably be required to perform certain judicial functions, he

would have to be vested with judicial powers; and that he should therefore be recruited from the Bengal Civil Service (Judicial); that he should be an officer of about four or five years' service and draw his pay according to the time scale. They observed that the scheme was likely to result in an appreciable saving to Government as district judges would have more time to devote to their ordinary judicial work and the demand for additional assistance would thereby be reduced to some extent. The Government of Bengal without expressing any opinion on the merits of the scheme in question felt obliged in view of the prevailing financial stringency to postpone its consideration.

17. The High Court of Bombay had moved earlier in the same direction and with greater initial success. They too were impressed with the serious inroads on the district judge's time made by the increasing administrative duties of the court and pressed for the appointment of a subordinate judge to be a personal assistant to the district judge and to be the registrar and the head of the establishment of the district and sessions court. The scheme was sanctioned by Government and appointments of registrars were made to the heavier district courts in the presidency, second class subordinate judges of eight to ten years' standing being generally selected for the purpose. But two years later these appointments came under the axe of the Legislative Council, all except one which is still in existence, for a special reason. The duties entrusted to these registrars are set out in detail in the following circular order of the Bombay High Court:—

In the districts in which the post of inspecting subordinate judge has been abolished, there should be a personal assistant or registrar as head of the establishment of the district and sessions court. He should be the officer to receive all applications, appeals, plaints and to interview pleaders and settle the boards, and distribute the work among the various branches. He should have under his direct personal supervision the correspondence clerk and shorthand writer, and when necessary a second correspondence clerk, for all correspondence on general matters unconnected with particular litigation. He should have under him regular branches with regular superintendents such as—

Civil suits, appeals and applications, including all correspondence relating particularly to such matters, registration, process, depositions, decrees and execution under, say, the civil sheristadar;

Criminal cases and appeals and applications including all correspondence relating particularly to such matters, registration process, depositions, judgments and sentences under, say, the criminal sheristadar;

Accounts including buildings, pay bills, travelling allowance, batta, process fees, dead stock, minors' estates, peons and farashes under a nazir or head accountant. Minors' estates might be divided between the deputy nazir and the nazir, the less important being managed by the

deputy nazir and the more important by the nazir. But the deputy nazir should be under the supervision of the nazir;

Records, including book-binder, despatch and post, libraries, records and sectioners under the head record-keeper.

The district judge shall have power to delegate all or any of the following judicial, quasi-judicial and non-judicial duties to the registrar of the district and sessions court:—

1. *Judicial.*

1. Declaring whether the summons has been duly served or not under Order V, rule 19, Civil Procedure Code.

2. Ordering substituted service under Order V, rule 20, Civil Procedure Code.

3. Requiring plaintiff to correct the valuation and to pay deficit court-fees under Order VII, rule 11, clauses (*b*) and (*c*), Civil Procedure Code.

4. Directing re-issue of summons under Order IX, rule 6 (1) (*b*), Civil Procedure Code.

5. Issuing notices on applications to set aside *ex parte* orders under Order IX, rules 9 (2) and 14, Civil Procedure Code.

6. Determining whether the interrogatories are properly answered or not under Order XI, rule 10, Civil Procedure Code.

7. Requiring the production of verified copies of accounts in place of the original books under Order XI, rule 19 (1), Civil Procedure Code.

8. Requiring an apprehended witness to furnish bail under Order XVI, rule 18, Civil Procedure Code.

9. Issuing or refusing to issue witness summons if the condition in rule 19 be not fulfilled under Order XVI, rule 19, Civil Procedure Code.

10. Signing a decree under Order XX, rule 7, Civil Procedure Code.

11. Issuing notice to a decree-holder of payment made in court by judgment-debtor, under Order XXI, rule 1 (2), Civil Procedure Code.

12. Notice to decree-holder to show cause why payment alleged by the judgment-debtor should not be certified under Order XXI, rule 2 (2), Civil Procedure Code.

13. Orders to safeguard the interest of the judgment-creditors who have not joined in filing a *darkhast* under Order XXI, rule 15 (2), Civil Procedure Code.

14. Returning for amendment applications for execution under Order XXI, rule 17, Civil Procedure Code.

15. Orders regarding execution of cross-decrees under Order XXI, rule 18, Civil Procedure Code

16. Issuing notices regarding execution under Order XXI, rule 22, Civil Procedure Code.

17. Ordering decree to be executed if the judgment-debtor does not appear and contend under Order XXI, rule 23 (1), Civil Procedure Code.

18. Ordering processes for execution under Order XXI, rule 24, Civil Procedure Code.

19. Examining serving officer regarding his inability to execute a warrant under Order XXI, rule 25 (2), Civil Procedure Code.

20. Transferring negotiable instrument or a share in execution under Order XXI, rule 80 (1), Civil Procedure Code.

21. Bringing heirs of deceased party on record and orders regarding abatement under Order XXII, rules 2, 3, 4, Civil Procedure Code.

22. Ordering service of summons on a firm under Order XXX, rule 3, Civil Procedure Code.

23. Examining a pauper applicant before application is registered under Order XXXIII, rule 4, Civil Procedure Code.

24. Allowing a ground to be added to the memos. of appeals and issuing notices to respondent about it under Order XLI, rule 2, Civil Procedure Code.

25. Returning memo. of appeal for amendment under Order XLI, rule 3, Civil Procedure Code.

26. Proviso to take security from appellant when he resides out of British India under Order XLI, rule 10, Civil Procedure Code.

27. Fixing appeals for admission under Order XLI, rule 11, Civil Procedure Code.

28. To sign a decree in appeal under Order XLI, rule 35, Civil Procedure Code.

Quasi-judicial.

1. Ordering summonses and letters in substitution of summons to issue under Order V, rules 1 and 30, Civil Procedure Code.

2. Determining the nature of summons to be issued under Order V, rule 5, Civil Procedure Code.

3. Receiving written statement under Order VIII, rule 1, Civil Procedure Code.

4. Receiving document produced by parties on the day fixed for the first hearing under order XIII, rule 1 (2), Civil Procedure Code.

5. Requiring the return of documents and substituting certified copies in their place under Order XIII, rule 9, Civil Procedure Code.

6. Calling for papers from records on the application of parties under Order XIII, rule 10 (1), Civil Procedure Code.

7. Directing issue of summons to witnesses under Order XVI, rule 1, Civil Procedure Code.

8. Calling upon the applicant judgment-creditor to produce a certified copy of decree if not already produced with *darkhast* under Order XXI, rule 11 (3), Civil Procedure Code.

9. Issuing a certificate when the court authorises a judgment-debtor to raise amount by proposed sale of attached property under Order XXI, rule 83 (2), Civil Procedure Code.

Non-judicial.

1. To receive plaints under Order IV, rule 1.

2. To cause plaints to be registered under Order IV, rule 2, Civil Procedure Code.

3. Signing concise statements under Order VII, rule 9 (4), Civil Procedure Code.

4. Original entry in a book of account to be marked and returned under Order VII, rule 17 (2), Civil Procedure Code.

5. Calling upon parties to deposit sufficient sum to cover the expenses of witnesses under Order XVI, rule 4 (1), Civil Procedure Code.

6. Furnishing certified copies of judgment and decrees under Order XX, rule 20, Civil Procedure Code.

7. Issuing a sale-certificate to purchaser under Order XXI, rule 94, Civil Procedure Code.

8. Receiving memos. of appeal under Order XLI, rule 1, Civil Procedure Code.

Provided always that the registrar to whom any such duties shall have been so delegated shall on demand of the party or either of the parties concerned refer his orders for the directions of the district judge.

Other Non-judicial or Administrative duties.

1. Supervision of the management of the minors' estates by the deputy nazir and private guardians.

2. Calling for reports and accounts from the deputy nazir and the private guardians.

3. Assisting the district judge in the inspection of lower courts.

4. Having charge of the appointment and transfer arrangements of the whole establishment of the department under the district judge.

5. Supervision over the establishment—clerical as well as menial under the district judge.

6. Disposing of correspondence and business of an ordinary nature, *e.g.*, office routine which can be disposed of according to the tradition and rules of the office and disposing of after obtaining the district judge's orders the correspondence with the subordinate judges relating to leave, pay, allowance of their establishments.

7. Signing pay-bills, abstract bills, contingent bills and countersigning travelling allowance bills periodical returns, budget estimates and similar matters of administration.

8. Exercising a general control over the record-keeper in providing for the proper sorting and destruction of records in accordance with the rules in force regarding the permanent and temporary preservation of such records.

9. Examining the nazir's accounts every quarter and checking the cash in the nazir's hand every month.

10. Arranging the board in fixing the appeals, etc., for hearing.

11. Returning of original documents, etc., produced by the parties in court whenever they apply for their return.

12. Having charge of the seals of the court.

13. Helping the district judge in the work of inspecting courts.

18. The registrar under this scheme as well as under the scheme contemplated by the Calcutta High Court is, it will be seen, mainly intended to be, what in fact he is alternatively designated in Bombay, the personal assistant to the district judge for the purpose of relieving him of his administrative and miscellaneous duties. As we have seen in a previous chapter these duties have been growing in volume and importance in almost every province and local Governments have impressed upon district judges their responsibility for paying personal attention to certain branches of these duties. Thus in the United Provinces, the district judges, and in Bengal and Bihar and Orissa the subordinate judges in charge of the accounts, under orders of the local Governments and High Courts have to exercise a careful personal check on all entries in accounts, as laxity in this respect had led to embezzlement of public money. Similarly in Bombay, say in a district like Ahmedabad, the district judge has to administer as many as 206 minors' estates of the total approximate value of nearly 33 lakhs of rupees. He has to devote personal attention to hundred and one points of management. The work of the nazarat has to be carefully checked by the district judge in every province and the process-serving staff throughout the district has to be controlled. Supervision has to be exercised over the work of munsifs and subordinate judges and their courts have to be inspected. Clearly it is impossible for the district judge with the staff at his disposal to attend to all these duties and at the same time to keep abreast of his judicial work, which has been growing everywhere. The munsarim has neither the necessary status nor the qualifications to render it safe to delegate these duties to him. In some places the expedient was tried of distributing among the several judicial

officers the various classes of work above described. One subordinate judge was deputed to look after accounts, another after the nazarat and a third after the copying establishment. But the process of delegation has this disadvantage that the district judge ceases to have that intimate touch with the details of administration of his office which he would have if the duties are delegated to an immediate subordinate in his own office. Besides, the subordinate judges to whom these duties are delegated have perforce to sacrifice a proportionate amount of their time available for the trial of cases. The system breaks down because demands are made upon it for the discharge of functions for which the necessary machinery has not been provided.

19. The registrar contemplated by the Bombay and Calcutta High Courts is an officer qualified, no doubt, by status and attainments to be entrusted with the discharge of responsible duties, but he is merely the personal assistant to the district judge and the head of his office. The Government of Bengal and the Legislative Council in Bombay were disposed to regard the appointment as a rather expensive luxury not to be indulged in in these days of financial stringency even if it would fully occupy a whole time officer. We would extend the sphere of his duties so as to meet these objections. Our conception of the registrar is that he should be an officer who is not only the head of the office of the district judge, but also the head of a unified office of all the courts whether of additional judges or subordinate judges or munsifs, situated in the district headquarters. Further, the registrar according to our scheme would have to discharge judicial duties in connection with all these courts analogous to the duties of the registrar of a County Court in England.

Our proposal is that the office of the registrar should be the office where all the plaints to be filed in any of the courts situated in the district headquarters should be filed in the first instance. The initial advantage of this system is that a registrar would be in a far better position than the sheristadar of a subordinate judge or of the munsif to scrutinise pleadings check the plaints, admit them, issue summonses, fix dates of hearing, decide uncontested suits according to a scheme to be described presently and pass on contested work to the courts of the several judges according to the settled principles of distribution or the exigencies of the cause lists.

The same scheme would be extended *mutatis mutandis*, to sub-divisional headquarters where there is a concentration of a large number of munsif's or subordinate judge's courts.

20. There is no doubt that this system would result not only in better administration but greater despatch and less expenditure. The small and imperfectly supervised establishments now situated in a number of out-of-the-way offices, where the light of day rarely penetrates would give place to a large and centralised office with a properly paid and responsible chief. The multiplicity of small offices without supervision and with grave temptations to dishonesty

will disappear. Not only the district judge but every additional and subordinate judge as well as every munsif will be in a position to see what is going on in the unified office in broad day light. The advantage to the public resulting from a unified office of this character will be very great.

21. Turning now to the judicial duties of the registrar, our idea is that the registrar would dispose of all the uncontested work of the courts whether on confession of judgment or compromise or *ex parte*. The procedure he would follow would be somewhat on the following lines.

Half an hour after the court has opened, he would call, in order of institution, all suits fixed for first appearance on that day. In suits in which judgment was confessed he would pass a decree at once. In suits in which the defendant was absent he would examine the return, and if the summons had been sufficiently served he would proceed *ex parte*. However the existing law may be remodelled as to *ex parte* proceedings, the registrar would conduct them. If the summons in the first instance be the summons to appear, the plaintiff would usually be in a position to adduce evidence which would be sufficient on which to grant an *ex parte* decree. The plaintiff would be present, and in the vast majority of cases, even if evidence be invariably required, his evidence either alone or supporting such documents as he may have produced, would be sufficient to justify the granting of an *ex parte* decree on the first hearing. In cases in which further evidence might be required before an *ex parte* decree could be passed, as for example in a suit on a mortgage which must under the present law be proved by an attesting witness, it would be a simple matter for the registrar to direct the plaintiff to produce the necessary evidence on an adjourned date, which would ordinarily be a date within a few days of the date of first hearing.

In suits, in which the defendant was absent and the summons had not been sufficiently served, the registrar would direct the plaintiff to file fresh process fees (proceeding *ex parte* when necessary against defendants who had been duly served) and adjourn the hearing to the next convenient date. The registrar would take up these suits on the adjourned dates.

In cases in which the defendant appeared and signified an intention to contest, the registrar would fix a date for filing a written statement, where a written statement was necessary. He could then either retain the suit in order to determine the issues himself, or send it at once to the judge having jurisdiction for trial and decision. There may be a difference of opinion as to whether the registrar should retain the suit in his own hands until the issues have been fixed or send the case for fixing of issues to the judge. The rule should be laid down according to the opinion prevailing in the province in which the system is introduced. Each province should lay down for itself how the contested work should be distributed.

22. Such a registrar should be an officer of attainments superior to those possessed by any of the members of the ministerial staff. He should be a subordinate judge or a munsif of considerable experience if he is to be the registrar of the district judge's court also. It should be decided in each province, separately, whether such a registrar should be of the standing of a subordinate judge or that of a munsif. If he is to be the registrar of a group of courts at sub-divisional headquarters, he need only be a comparatively junior judicial officer. It is not suggested that, unless he is an officer of superior judicial status, he should be entrusted with such jurisdiction as would permit him to grant temporary injunctions. His position, as we have already said, would be analogous to the position of a registrar of an English County Court or the registrar of an Indian presidency small cause court.

23. The scheme cannot, on the face of it, be applied to places where there is not sufficient work for an officer of this class. It appears to us, however, that where there is sufficient work its introduction will effect a very considerable saving of time in uncontested cases and an appreciable saving of time in those contested. We consider that the introduction of this system will result, after the initial period has passed, in a financial saving, as it will then be possible to reduce the staff and the cadre of judges to the extent to which the registrar will be able to relieve them of their duties. Such a financial saving can hardly be expected at the outset: it will, however, come eventually.

24. Two examples will show how the proposed system would have worked in 1922 in a headquarters station and in a sub-division in Bengal. The first example is that of the headquarters station of the Mymensingh district.

Figures of work in 1922 in the courts of subordinate judges and munsifs stationed at headquarters in the District of Mymensingh, Bengal.

Subordinate Judges.

Court.	Regular suits.			S. C. C. Suits.			Appeals.		Miscellaneous.		
	Instituted.	Disposed of.	Contested.	Instituted.	Disposed of.	Contested.	Disposed of.	Contested.	Execution.	Judicial.	On appeal.
1st Subordinate Judge	308	252	63	500	857	110	204	160	323	136	34
2nd ditto	188	187	36	..	..	..	217	201	130	69	23
3rd ditto	148	170	51	..	..	..	237	212	117	59	24
4th ditto	216	189	35	49	22	1	250	226	136	73	17
TOTAL .	860	798	185	549	879	111	908	799	706	337	98

Munsifs.

Court.	REGULAR SUITS.						S. C. C. SUITS.		MISCELLANEOUS.		
	MONEY.		RENT.		TITLE.						
	Disposed of.	Contested.	Disposed of.	Contested.	Disposed of.	Contested.	Disposed of.	Contested.	Execution.	Judicial.	Non-Judicial.
1st Munsif . .	101	19	1,752	74	518	76	1,349	102	1,804	307	1
2nd do. . .	58	10	2,306	109	449	82	1,070	104	1,975	212	24
3rd do. . .	59	10	1,896	146	442	79	509	55	1,552	246	..
TOTAL .	218	39	5,954	329	1,409	237	2,937	261	5,331	765	25

As the table above shows there are four subordinate judges and three munsifs at headquarters. It gives the number of cases instituted and disposed of in the courts of subordinate judges and disposed of in the courts of munsifs. The institution in the munsifs' courts was:—

Regular suits	7,783
Small cause court suits	3,216
TOTAL .	10,999

The disposals amounted to:—

Regular suits	6,581
Small cause court suits	2,937
TOTAL .	9,518

Had there been a registrar in Mymensingh in 1922, he could have handled the total number of institutions, *i.e.*—

Regular suits of subordinate judge's courts	860
Regular suits of munsifs' courts . .	7,783
Small cause court suits	3,765
TOTAL .	12,408

The number is large, but it is well within the power of one man to handle. Orders could be passed in the manner suggested on the first day of hearing, on twenty to thirty suits in an hour. Taking the lower figure, this would represent 620 hours work or less than three hours a day during the working days in the year. This would

have left the registrar ample time for his other work, including the disposal of *ex parte* cases in which further evidence was required. All this time would have been saved by the presiding officers. It cannot be ascertained on the figures at our disposal, how many of the suits instituted in 1922 were contested, but, taking the percentage of contest of the previous year, the following calculation may be accepted as approximately correct. There would have been contested in 1922 in—

Subordinate judges' regular suits . .	197
Munsifs' regular suits	700
Small cause court suits	376
TOTAL .	1,273

By the adoption of this method 11,135 uncontested suits would have been disposed of, for the most part, on the first date of appearance. Even if a registrar had not been appointed, it would have resulted in considerable expedition in Mymensingh if one subordinate judge had been put in original charge of all institutions in subordinate judges' courts, disposing of uncontested matters and dividing contested matters between himself and the other courts. If this officer had further been put in charge of the small cause court work of the whole of the Mymensingh sub-division, there would have been a considerable speeding up in the decision of the small cause court suits. If one munsif had been put in charge of all munsifs' institutions, disposing of all uncontested matters, sending contested rent suits to a second munsif, and dividing the remainder of the work between himself and the third munsif, there would have been again a considerable saving of time.

25. The figures of work in 1922 in the courts of munsifs stationed in the sub-division of Narainganj in the district of Dacca, Bengal, are:—

Court.	REGULAR SUITS.						S. C. C. SUITS.		MISCELLANEOUS.		
	MONEY.		RENT.		TITLE.						
	Disposed of.	Contested.	Disposed of.	Contested.	Disposed of.	Contested.	Disposed of.	Contested.	Executions.	Judicial.	Non-Judicial.
1st Munsif . .	173	20	701	67	205	48	1,753	81	752	153	24
2nd do. . .	142	31	964	79	220	43	1,253	132	511	124	1
3rd do. . .	260	30	1,180	72	380	54	1,098	66	723	233	21
Additional Court .	168	34	1,143	195	231	45	1,358	127	823	343	1
TOTAL .	743	115	4,048	413	1,036	190	5,252	406	2,809	863	47

The system would have worked in 1922 in the Narainganj subdivision of Dacca in the following manner. There were three munsifs and an additional court. The table above gives the figures of decisions. The institutions were 6,114 regular and 5,287 small cause court suits. There would appear to have been sufficient work for a registrar here. He would have had to handle 11,401 institutions representing 380 to 510 hours work of which, on the percentages of the previous year, he would have decided 5,381 uncontested regular suits and 4,864 uncontested small cause court suits, handing over 733 contested regular and 423 contested small cause court suits to the munsifs' courts. Here, similarly if a registrar had not been appointed, it would have resulted in improved expedition, if the work had been divided as it is suggested it should have been divided at Mymensingh.

26. These suggestions appear to us to deserve consideration, wherever either the appointment of a registrar, or the division of duties is feasible or practicable. It appears that in many parts of India, notably Madras, Burma and the North-West Frontier Province, the work is not generally grouped in a manner which will enable these proposals to be put usually into effect. Where their acceptance involves discomfort to litigants by obliging them to undertake long journeys, we do not suggest their acceptance. These suggestions can be applied most effectively in Bengal, but there are many places in Bengal itself, where they cannot be put into force even in a modified form.

There are in every province a certain number of district headquarters with a large agglomeration of courts where the district judge finds the administrative and miscellaneous work unmanageable. It is in such places that the appointment of registrars is highly desirable from the point of view of efficient administration no less than one of speedy justice. The administrative duties of such a registrar would be those described in the circular of the Bombay High Court which we have already quoted. He would also have judicial duties to perform such as we have just described. Some legislative action will be necessary so as to invest him with jurisdiction to discharge these judicial duties.

27. If the registrar is a munsif or a second class subordinate judge he would not ordinarily have jurisdiction to take cognisance of even *ex parte* suits triable by a first class subordinate judge. But to ensure all uncontested work being quickly disposed of in one court, there would be no serious objection to his being invested with powers of a first class subordinate judge for the trial of such suits *ex parte*, as the main question for decision in such cases is the question of the proper service of process. Again, with regard to appeals from his decision, provision should be made that the appeal would be to the court which would have ordinarily heard the appeal if the court having jurisdiction had tried the suit.

The financial effect of such an appointment will vary in different provinces according to the scale of establishments maintained in each province. But some economy in the establishment charges

will certainly result in every province as the several munsifs and subordinate judges will no longer each require a sheristadar and the entire complement of clerks but only a peshkar and one clerk. There will also result in time a reduction in the cadre of judges as the registrar will do the entire administrative work and the uncontested judicial work of all the courts, leaving the judges no other work but the trial of contested suits.

CHAPTER 10.

Process Serving.

1. Opinion is almost universal that one of the main sources of delay in the disposal of suits and other original proceedings as well as of appeals and execution petitions is the delay in the service of processes. All proceedings in civil courts are initiated by the presentation of plaints or petitions and it is by the service of processes that the opposite parties are called upon to answer the case against them. Similarly, the court executes its decrees and orders by the issue of processes. Delay in the service of processes necessarily entails delay in the hearing of civil proceedings. Conversely hasty or improper service gives rise to proceedings to set aside decrees or orders. A large part of the time of courts will be saved if a reliable and efficient agency for the service of processes can be devised.

It is therefore of the highest importance to institute a careful enquiry into the defects of the present system and the causes that contribute to the unsatisfactory character of the service of processes. It would be no exaggeration to say that in the interests of efficient administration of civil justice satisfactory service of processes is as essential as the competency and honesty of tribunals.

2. It will be convenient to deal first with processes on defendants and respondents before decree or order and to consider seriatim the various causes that tend to delay their service. At the very outset is the delay caused by the nonpayment of process fees and diet money in time. The rules of practice of the several High Courts prescribe a maximum period for the payment of process fee and diet money from the date of the order directing issue of process. In Madras under Rule 24 of the Civil Rules of Practice the period allowed is seven days in the case of a plaint. The fixing of a maximum period often leads to laxity. For some reason or other the payment is delayed in most cases at least up to the end of that period even when such a long period is not necessary. When the period is exceeded, the courts are reluctant to take action under Order IX, rule 2 of the Civil Procedure Code and to dismiss the proceedings for failure to pay the process fee in time. A considerable time is thus wasted at the very threshold of the suit or proceeding. There seems to be no reason why there should not be a general rule directing that the payment of process fee and diet money should be made along with the filing of the suit or proceeding. It was objected in Madras that this procedure will lead to some inconvenience because, until the plaint is registered, the amount paid cannot be credited to any particular suit. But this objection can easily be met by keeping a separate register for unfiled proceedings and crediting the amount paid to the serial number in that register or in the alternative the rule of the Patna High Court may be adopted, which prescribes that all plaints must be registered on presentation irrespective of

any question as to their possible rejection (Rule 11, Chapter 1, Part 1 of the General Rules and Orders of the Patna High Court).

The present practice may lead to very serious hardship to the defendant, especially in the case of *ad interim* injunctions and attachment orders issued to persons not parties to the suit to the prejudice of the defendant. The plaintiff may negligently or designedly delay or withhold the payment of the process fee and the *ad interim* injunction obtained to the prejudice of the defendant may take effect for an indefinite period without notice being given to him.

The general rule should therefore be that process fee and diet money should be filed with the plaint or proceeding except in cases where the court for reasons to be recorded dispenses with the payment at that stage.

3. Next, delay is liable to occur in the preparation of processes. This delay takes place in the office. It is most acute at certain times of the year when a large number of suits is filed on the same day as on the reopening of the courts after the vacation in all provinces. In some provinces owing to the establishment being shorthanded and the work being congested the delay in the preparation of processes seems to be a normal feature.

The only remedy, if processes are prepared by the court establishment, is for the judge to exercise a closer supervision over the preparation of processes in his office by calling for and scrutinising daily an arrear list of the processes to be prepared.

The practice prevailing in Bengal and in Bihar and Orissa of getting all processes prepared on forms supplied by the court by parties or pleaders is in our opinion an important labour saving reform which makes for expedition. We would recommend its general adoption in every province The parties or pleaders should be held responsible for the accuracy of the information supplied and the pleaders should be entitled to charge an authorised scale of fees from the parties. The duty of the court establishment should be confined to inserting the necessary dates and getting the processes signed. The processes should then be made over to the nazir forthwith for service without any further direct communication between the court establishment and the parties. By this means a good deal of petty corruption in the office would be avoided.

4. After the processes are prepared they are sent to the nazir for service. Delay often occurs in the nazarat in the distribution of processes to the process serving peons. The most convenient method seems to be to distribute the processes on the beat system which prevails in most provinces. The area under the jurisdiction of the court is divided into convenient circles. In densely populated areas such as towns and also in other areas the work is organised on post office lines. In these circles processes are sent for service at regular intervals. The boundaries of the circles and the fixation of the intervals may be varied from time to time as experience dictates. To equalise the work of the process-servers

a certain amount of short beat work as well as a certain amount of long beat work is given to each process-server in the month. To enable the judge to fix the next date of hearing reasonably early but with the knowledge that sufficient time has been given for the service of all processes the practice may conveniently be adopted that the nazir should prepare a statement showing on what days processes are sent out for service in any particular circle and how long the process-server is supposed to be away on that particular beat.

For example:—

"*Beat No. 9*—Processes issue every Tuesday—Process-server returns after eight days."

A copy of this statement and a list of villages included in each beat may be kept in each court room in the station.

To ensure that the processes are fairly distributed amongst process-servers and that a fair average of work is attained by each process-server a statement in the following form is prepared every quarter in some parts of Madras and submitted to the district judge. It may be usefully adopted in other provinces:—

Statement showing the number of processes executed and the number of miles travelled by amins and peons during the——— quarter 192 .

No.	Names.	Caste.	Number of processes executed.	Number of arrest warrants executed.	Number of miles travelled.	Remarks.

5. In several provinces process-servers have to keep regular diaries of their movements, and the work done by them from day to day. The following is one form of the diary in use in the Bombay Presidency:—

Date of receipt.	Number and kind of processes received with the numbers of the cases they refer to and the money received with them.	Date fixed for their return by the nazir.	Date of service.	Places visited and the distance travelled.	Processes served.	Processes attempted but unserved.	Processes and money returned to the court with the signature of the officer to whom they are returned.	Signature of the patel or other well-known person in the village visited by process-server.

Another form of diary in use in Bengal is given below:—

Date of journey.	From	To	Distance in miles.	Nature of process received for service.	On whom served.	How served.	Date on which returnable.	Amount of process fees and other dues realized.			Remarks.
1	2	3	4	5	6	7	8	9			10
								Rs.	A.	P.	

The usefulness of this diary for the purposes of check and supervision will be adverted to later. At this stage all that need be stated is that it shows at a glance how the work has been apportioned to each process-server and how it has been done. Entries are made in the process-server's register from this diary against each process-server showing the work done by him. At the end of the month a statement in the following form may usefully be prepared and placed before the presiding judge. A copy of the statement with the remarks of the presiding judge should then be forwarded to the district judge who will thus be in a position to compare the work done by each process-server in the several courts in his jurisdiction and take disciplinary action where necessary. A system somewhat like this is in force in several districts in the Madras Presidency and has led to excellent results.

Serial number.	Name of process-server.	Defendant's Summons.										Witness's Summons.			Execution process.						
		Number of cases entrusted to him.	Number in which personal service was effected.	Service on son or adult male member of the family.	Percentage of 4 ÷ 5 to 3.	Defendant absent outside district. Copy affixed.	Defendant absent inside district. Copy affixed.	Other cases Refusal, etc.	Defendant having died or having no residence. Copy not affixed.	Total of columns, 4, 5, 7 and 8.	Total of columns 4, 5, 7, 8, 9 and 10.	Number entrusted.	Number served personally on witness.	Percentage of 14 to 13.	Number of arrest warrants entrusted.	Number of cases of actual arrest.	Percentage of 17 to 16.	Number of warrants or attachment of moveables entrusted.	Number of cases of actual attachment.	Percentage of 20 to 19.	Remarks by the Judge.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22

The distribution of processes on the beat system will of course have to be departed from in cases of urgent processes or in cases where there is an accumulation of processes for a particular beat. The general rule should be that no process should be kept in the nazarat undistributed for more than three days and the judicial officers who are keen on this branch of their work call for a certificate from the nazir every day stating that no process remains in his office undistributed for more than three days.

6. It often happens that processes are returned unserved a considerable time before the date fixed for hearing. It should then be made the duty of the nazir to give out the processes for re-service if there is sufficient time before the hearing. In some provinces the salutary rule is adopted that parties should ascertain a week before the date of hearing which of their processes are returned unserved and should then ask for the services of a special process-server to have them served at once. Failing this, the parties are not allowed to apply for a fresh service on the date of hearing. This seems to us to be a useful practice, especially in the case of processes to witnesses.

7. Next we come to the delay in actual service. This may be due in the first place to the insufficiency of the address of the defendant. It is notorious that many processes are returned unserved because it is impossible from the description of the defendant in the process to identify him or to trace his residence. Several persons bearing the same name may be residents of the same village. A little more care in giving the address will render service far more prompt. There is no reason why in municipal towns and local unions the name of the street and the number of the house should not be inserted. It should be generally insisted upon that in the application for process the full address of the defendant should be given stating his name, his father's name, his caste, and the name of the street and number of his house in municipal areas and local unions and in other cases the defendant's house should be specified with further particulars where possible.

8. This is a convenient place to recapitulate in greater detail the mode of service of a process and of the proof of such service as prescribed by the Code of Civil Procedure. The Code provides in substance that service shall be by a court peon by delivery of a copy of the summons to the defendant personally or to an agent or other person on his behalf and by obtaining the signature of the person to whom the copy is delivered to an acknowledgment of service endorsed on the original summons (*see* rules 10 to 16 and rule 18 of Order V). The proof of such service is a return of the serving officer endorsed on or annexed to the original summons stating the time when and the manner in which the summons was served and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of the summons (*see* rule 18). An additional proof is prescribed by Form No. 11 of Appendix B to Schedule 1 of the Code which lays down the form

of an affidavit of the process-server to accompany the return of a summons or notice. The form of this affidavit especially with regard to persons not personally known to the process-server is so important and has given rise to so many difficulties in the service of processes in certain provinces that it may conveniently be transcribed here.

Affidavit of Process-server to accompany return of a summons or notice (Order 5, Rule 18).

The affidavit of son of

I $\frac{\text{make oath}}{\text{affirm}}$

and say as follows:—

(1) I am a process-server of this court.

(2) On the day of 192 I received a $\frac{\text{summons}}{\text{notice}}$ issued by the court of in Suit No. of 192 in the said court, dated the day of 19 for service on

(3) The said not being personally known to me accompanied me to and pointed out to me a person whom he stated to be the said and I served the said $\frac{\text{summons}}{\text{notice}}$ on $\frac{\text{him}}{\text{her}}$ on the day of 19 at about o'clock in the noon at by tendering a copy thereof to $\frac{\text{him}}{\text{her}}$ and requiring $\frac{\text{his}}{\text{her}}$ signature to the original $\frac{\text{summons}}{\text{notice}}$

(*a*)

(*b*)

(*a*) Here state whether the person served signed or refused to sign the process and in whose presence.

(*b*) Signature of the process-server.

or

(4) One accompanied me to and there pointed out to me which he said was the house in which ordinarily resides. I did not find the said there

(*a*)

(*b*)

(*a*) Enter fully and exactly the manner in which the process was served, with special reference to Order V, rules 15 and 17.

(*b*) Signature of process-server.

The procedure to be followed by the process-server with reference to these rules and this form has been differently construed in different provinces. In Bombay the rule is distinctly laid down that no process-server charged with the service of a process is entitled to call upon the party interested in the service to point out the person to be served. It is the duty of the process-server to use his best efforts to effect the service and it is only

when he fails in spite of such efforts that the court may order the party to render help to him. By a special resolution of the Government of Bombay village officers have been instructed to give every assistance to the process-servers when serving processes. In cases where the serving officer does not know the individual on whom the process is to be served but such individual is pointed out to him, the rule of the Bombay High Court no doubt provides that there should be a verification of the endorsement on the process by the person who points out the individual served, but in practice this requirement is dispensed with (*vide* Manual of Circulars—Bombay, page 232). In Madras rule 25 of the Civil Rules of Practice requires that the return of the serving officer should state the manner of service, the place, day and the month and whether he is personally acquainted with the person, and if not by whom he was identified; and rule 26 provides that the return should be verified by an affidavit of the serving officer and that if the serving officer is not personally acquainted with the person served there should either be an affidavit by the person identifying him or a report signed by the village officers. The affidavit of the identifier is dispensed with in practice and his signature on the report is considered sufficient. In the Central Provinces the return of the process-server is considered sufficient proof and neither the affidavit of the process-server nor of the identifier is insisted upon.

9. It is in the provinces of Bengal and Bihar that the problem of serving processes and of securing proof of service presents peculiar difficulties. One reason is that the land revenue being permanently settled, local village officers are not always available to give assistance to the process-servers. The invariable practice is that the plaintiff has to supply an identifier who is to accompany the process-server and to point out the defendant. By a rule of long standing made by the High Court service is proved by the affidavit of the peon and, where the defendant is not personally known to the peon, by the affidavit of the identifier. The system is that one of the peons attached to the nazarat is sent out into the interior as occasion arises with a batch of fifteen to twenty processes at a time to be served in different villages at various distances from the court. The process-server is in each case accompanied by an identifier obtained on reference to the party or to the pleader by whom the process is taken out. Where this is not done, the summons will, as a matter of course, be returned unserved and without attempt at service with the reason " absence of an identifier." Flagrant instances of return of processes unserved on well-known business firms in the heart of Calcutta on the ground of " absence of an identifier " were mentioned by the witnesses and brought to light on examining the records of decided cases.

Under this system even in the case of genuine service the cost involved to the party in finding an identifier to accompany the court peon and in securing his affidavit is considerable and is often far in excess of the amount of process fee. The identifier has to

await the convenience of the court peon in going to the village. Most of the litigants find it most convenient to make terms with the peons and, even where they are able to supply an identifier at the required time and place and the service is properly effected, there are strong reasons for believing that the party is obliged to make terms with the peon to guard against a defective service report.

In cases of dishonest litigants this system lends itself to the most flagrant corruption and to the misuse of the courts' processes. A plaintiff anxious to snatch a decree provides a creature of his own as identifier, and in collusion with the process-server, who for his own sake is not unwilling to avoid a tedious journey, suppresses the service and procures a false return supported by the affidavits of the process-server and the identifier. This is more especially the case in suits for money or rent before munsifs where the plaintiff prefers false or exaggerated claims. It rarely occurs in title suits before subordinate judges. As a striking commentary on the value of the identifier system we may refer to the results of a test enquiry into fifty specific cases of reported service made by the district judge of Dacca in the year 1916. It was found that in nine of these cases the peon had reported service on persons, as living persons, when in fact these persons had long been dead. In seven cases personal service was shown on persons who were elsewhere at the time of the alleged service. In eight cases personal service was reported when in fact the peon had not gone to the place at all. In six cases processes were returned unserved on the ground that no identifier was supplied when in fact identifiers were supplied or were unnecessary.

10. A committee on ministerial services appointed by the Government of Bengal in 1905-06 describe the abuses of this system in language none too strong. They say:—

> "There is a strong feeling amongst the judiciary and we are convinced that it is well founded, that these affidavits (of identifiers) gives rise to more fraudulent suppression of service than any other system that could be devised. A professional class of identifiers has arisen to whom the swearing of a false affidavit presents no difficulty whatever and in conjunction with lazy and corrupt peons, the whole business of serving and reporting on a process is frequently done in the nearest bazar without ever going near the unfortunate person who is subsequently condemned for non-attendance with little or no hope of redress as he has the oaths of the identifier and the peon against him and has nothing but the vague evidence of himself and his neighbours to prove a negative. It appears to us that the constant use of the form of solemn affirmation by a peon deprives it practically of any force that it may be supposed to possess as a religious sanction."

The evils of the present system of identifiers in Bengal are so great that the evidence is unanimous that some remedial measures are urgently called for. The above committee observed that all that the courts are concerned with is to get trustworthy men to witness services of processes in the village themselves and they add that if those witnesses are accredited to Government and can be readily got at through district magistrates in the event of any subsequent enquiry being necessary, so much the better. That committee suggested that instead of an identifier, who is always an interested and too generally an unscrupulous person, it would be better to make it compulsory to obtain the signatures or thumb marks of two respectable villagers on the spot as witnesses to the service, observing that there is no reason why a village organisation which is already in existence or may be brought into force for another purpose should not be utilised by the courts to get rid of the evils of the present system.

11. The recommendations for improvement made by the witnesses examined before us generally follow the lines of these suggestions. Sir P. C. Mitter suggested to us that the main staff of peons in the nazarat should be decentralised and in places where there are union boards some peons might be placed under the president and in other areas under the president of the chowkidari panchayats. By this means he thinks that the necessity of having an identifier supplied by the plaintiff will disappear as a general rule. These officers would receive the processes by post, keep a register of services and verify the peon's return, etc. Sir P. C. Mitter did not propose to abolish the necessity for an affidavit of the identifier. He admitted that the president would in any case have to be given a clerk and some small remuneration for himself. As against this he considered that the ministerial nazarat establishment might be reduced and that in their village homes peons would serve at less pay than elsewhere. It may be that if some such decentralisation is practicable use might be made of dafadars and chowkidars under the union boards.

We may here mention that the Government of Bengal has recently made provision by rules framed under the Bengal Village Self-Government Act, 1919, for service of revenue and criminal processes through dafadars and chowkidars under the union boards. The courts issuing the processes send them direct to the president of the board who makes them over to the dafadars and chowkidars and return them to the issuing authority after they are served. All processes received are entered in a register of processes kept by the president and a fee of two annas is paid to the union fund for each process served. But there are serious difficulties in the way of employing dafadars for serving processes of civil courts. There are difficulties of dual control as the dafadar and the president are under executive officers while the actual judge of their work will be the courts themselves. Difficulties will also arise if dafadars have to attend

civil courts, as may frequently happen, to give evidence regarding processes served by them. The best agency seems therefore to be a special peon or a batch of peons appointed for each union.

On the other hand Sir Jwala Prasad considers that without decentralising the ministerial staff of the nazarat, all that is necessary is that the identifier should be a person of the locality, preferably connected with the Government service, a union panch where a union board exists or a dafadar or chowkidar in chowkidari unions. He is of opinion that an affidavit of the identifier is unnecessary and that an affidavit of the peon is sufficient in the first instance.

A third suggestion is that the process-server should in every case approach the president panchayat or in his absence the collecting panchayat or any other member thereof or the secretary of the union board, where there is a union board, for giving him somebody to identify the person to be served and that after service the process-server should obtain the signature of the identifier and of the person he approaches on the return and on the diary.

The question is largely one of village administration and requires consideration from points of view other than the point of efficiency in the administration of civil courts. In what manner precisely the village organisation can be utilised in these provinces for the service of process to remedy an admittedly gigantic evil is for the Local Governments to consider.

12. A word may here be said about the identifier's affidavit. As we have seen, Order V, rule 18 merely requires an endorsement by the process-server of the time and manner of service on the original summons, as proof of service. Form No. 11 prescribes a form of affidavit by the process-server, but nowhere in the Code is the necessity for an affidavit by the identifier laid down. That requirement is prescribed by the rules framed by the several High Courts. We have seen that in Bombay there is no such practice. In Madras the rule is in practice greatly relaxed and the signature of the identifier on the process-server's return is accepted as equivalent to an affidavit. It is only in Bengal and Bihar that the rule is observed. If the identifier is to be a person from the village, as it is hoped will eventually be the case, the necessity of dragging him before the court for the purpose of swearing an affidavit will be an unnecessary harassment. For these reasons it is hoped that the necessity of the indentifier's affidavit will eventually be dispensed with in all provinces.

Turning next to the process-server's affidavit, the Bengal Committee has, as we have already observed, commented on the solemn farce of the nazir recording utterly untrustworthy affidavits sworn in a perfunctory manner. In the Central Provinces the process-server's affidavit is entirely dispensed with. In several provinces

the evidence is that the swearing of affidavits has become a mere formality. It seems to us that the nazir might well be relieved of the duty of swearing affidavits and the time thus saved utilised for more effective supervision in other directions on the lines to be suggested below. The return of the process-server may well be considered in the first instance as sufficient proof of service.

If the above proposals are accepted some alterations may be necessary in the second and forth parts of (3) in Form 11. The words " accompanied me to " seem to have given trouble.

13. We come now to the delays in the service of processes caused by the fraud or negligence of the process-server. The process-server may return the process unserved without proceeding to the village at all either through indolence or in collusion with the defendant. He may proceed to the village and in collusion with the defendant fraudulently return the process unserved stating that the defendant is not to be found. Or proceeding to the village in collusion with the plaintiff he may fraudulently serve the process on the wrong person, or lastly having proceeded to the village return the process unserved without making proper enquiries and without attempting service.

14. The first remedy that can be suggested as a check to these frauds is efficient supervision by the nazir and by the presiding officer. As stated above, a monthly return of work done by each process-server with special reference to the percentage of personal service effected by him is in some provinces submitted by the nazir to the presiding judge and by him forwarded with his remarks to the district judge, who in his turn orders disciplinary action to be taken against the most inefficient process-servers in each court. This action may take the form of a fine, reduction or dismissal. The method adopted by a district judge who every month dispensed with the services of the process-server whose percentage of personal service was lowest in the court is said to have led to very satisfactory results. Whatever the method adopted may be, the main thing is to make the process-servers feel that their work is being supervised by a responsible officer. Under the present system the staff of process-servers in most provinces in view of the absence of efficient control and supervision have been described by the witnesses as the most undisciplined body of public servants.

15. Several checks have been devised in certain provinces to counteract the more common forms of fraud perpetrated by process-servers. The most elaborate system is that in use in the Bombay Presidency. The first object to be secured is that the process-server really goes to the village to serve his process instead of sending a return of non-service from the premises of the court. This object is attained by providing a column in the process-server's diary in which he is required to obtain the signature of the village officer or of some respectable person in the villages visited by him.

At the same time the process-server is required to sign his name in a book known as the "Process-server's patrol book" kept in each village by the village officers. The book is in the following form:—

Form of Process-server's patrol book.

Signature of officer.	Date of arrival.	Date of departure.	Summary of work done.	To what village proceeding next.
1	2	3	4	5

This method sufficiently ensures that the process-server, at any rate, goes to the village. But the most effective check on the work of the process-servers in the village itself is by devising ways and means to supervise their outdoor work and their conduct in outdoor duties by local inspection by a responsible officer. This was realised by the Bengal Committee above referred to, who recommended that the nazir, instead of wasting his time in recording utterly untrustworthy affidavits and relieved, if possible, of his duties as cashier by the appointment of a naib nazir should be deputed to go out and test a certain proportion of the services in the village and thus perform his proper functions as head bailiff of the court. The rules framed by the Calcutta High Court as well as by the Patna High Court provide for a local verification by the nazir of the returns of processes in the interior to be made either before or after the disposal of cases. But the district officers examined before us stated that this rule is not regularly carried out though in some districts occasionally a little inspection is done. One district judge, who was keen on this branch of his duties stated that all that he could do was to depute his nazir once a year during the Christmas holidays for purposes of local verification. He added that as a result of this verification two cases of fraud were brought to light and the process-servers concerned were brought to book.

16. But this local inspection to be effective must be prompt and must be continuous so that the fear of detection should always be present to the mind of the process-server. In the Central Provinces there is in existence a class of process-servers, known as the first grade process-servers, whose business it is to check and supervise, under the orders of the nazir, the work of the peons of the lower grades. One mode of check which is frequently practised is to send out a first grade server suddenly, and without previous notice to anybody, to go over the ground that some peon has just been over and to test the correctness of that peon's returns by actual enquiry at each place, the result of such enquiry being

noted in the prescribed register. This test is applied to the returns of different peons taken at random so that the inspecting process-servers from time to time visit all parts of the district. It is stated that this system was found to work well.

But, obviously, this system has the inherent defect that the check exercised is by a subordinate officer over the work of another subordinate officer of nearly the same status. If the system is worth trying at all, the check must be exercised by a responsible officer of a superior grade in the ministerial establishment. This is realized in the Bombay Presidency where the inspection is made by an officer known as the inspector of bailiffs who combines also the functions of a deputy nazir and ex-officio guardian of minors' estates and is partly paid out of the fees from the minors' estates administered by the court. The inspector of bailiffs pays a surprise visit to four or five villages in each beat. Either from materials furnished by the diaries of the process-servers whom he meets while out on process serving duty or from the information furnished from a few processes selected at random as well as from entries made in the process-server's patrol book he ascertains whether the process-server really visited the village, if so, whether as a matter of fact on that day and at that hour the process-server did attempt to serve the process, and whether the cause of non-service or the manner of service is true. This he can easily do by questioning the people, the party concerned, etc., more especially if the date of non-service or service as the case may be is of reasonably recent date. At the same time, the inspecting officer chooses other processes of attachment or sale to verify on the spot endorsements as to execution. The result of these inquiries is embodied by the inspector of bailiffs in a report submitted to the district judge through the court concerned. Much, no doubt, depends on the energy, activity and independence of the inspecting officer. Much also depends upon the interest displayed by the presiding judge as well by the district judge. But the evidence in Bombay was unanimous that since the introduction of the system a few years ago there has been a very marked improvement in the work of the process-servers.

It is greatly to be regretted that owing to the needs of retrenchment this salutary check of the work of process-servers has had to some extent to be abandoned in the provinces in which it was enforced. In the Central Provinces the grade of first grade process-servers is under abolition. And in the Central Provinces as well as in Bombay inspection by nazirs of sub-divisional courts has been given up as owing to the recommendations of the Retrenchment Committee, their travelling allowance while on inspection duty has been disallowed. Inspection by the inspector of bailiffs is however still carried on in Bombay and continue to yield excellent results.

17. Closely connected with the question of the supervision of the work of the process-servers is the question of central and separate nazarats. The practice in most provinces is that at the

headquarters station or a sub-divisional headquarters where there is a concentration of several courts there is one general establishment of peons under the immediate direction of the central nazir for the service of processes issued for service within the jurisdiction of all the courts at the headquarters, and all processes issuing for service within such jurisdiction are forwarded to the central nazir for service. The obvious advantage of the central nazarat system is that the processes sent out on the same day for service on persons residing in the same neighbourhood are served through one peon and not through several, notwithstanding that the processes may have been issued by separate courts or in separate suits or proceedings. The overlapping of the itinerary of several process-servers in one and the same direction is thus avoided resulting in a great saving of man power. An even greater saving of man power would result if processes of judges' and subordinate judges' courts which have to be served within the jurisdiction of a subdivisional nazarat were sent by post for service to the nazir of the subdivisional court as is done in Bombay and Madras instead of being served by peons whose headquarters are at the headquarters station as is done in Bengal. The number of peons attached to the judge's court would then be capable of considerable reduction and the work of swearing affidavits and control over these processes would be done at the subdivision instead of at headquarters.

Complaints were made against the central nazarat system by several munsifs and subordinate judges examined before us on the ground that the presiding officer has no control over the process-servers serving the processes of his own court with the result that discipline amongst them was liable to be lax. It was also pointed out that under this system facilities for the service of emergent processes were not readily available. These complaints became so serious in the Presidency of Madras that the system of separate nazarats was tried as an experimental measure in the three districts of Godavari, Tinnevelly and South Malabar for a period of three years. The experiment, however, was abandoned as it was found that while involving a financial loss, as the establishment of amins and peons had to be considerably increased, there was no compensating advantage because the minimum standard of service was not reached. It was also found that the abuses in the work of the process-servers which it was hoped the direct control of the munsifs could check, *e.g.*, sharp practices in the village, were such as the munsifs could not prevent by personal supervision and called for disciplinary action and scrutiny which the district judge could more efficiently exercise. The reports from two of the three districts were emphatically in favour of the abandonment of the separate nazarat system. It was brought to notice that sometimes the process-servers of as many as six courts had to go to the same place simultaneously for service of their respective processes and that amins and process-servers had to be kept waiting for a sufficient number of processes to accumulate, thus accentuating the delay.

The characteristic feature of the separate nazarat system tried in Madras was that processes were never served in outlying munsifis except by process-servers of issuing courts and the reasons assigned for this practice was that the presiding officers of the outlying munsifis took no interest in the processes issued by other courts. The Government of Madras ordered a reversion to the central nazarat system expressing an opinion that the separate nazarat can only be a success if they can be introduced without extra cost and without the work overlapping—a condition which from the inherent nature of the system must continue to remain a pious hope.

The balance of convenience then points to the system of the central nazarat being continued; but sufficient facilities should be given for the service of emergent processes as they arise by detailing three or four process-servers to each court solely for the service of emergent or town processes. Subject to this safeguard the central nazarat system has every advantage in its favour. Some subordinate judges and munsifs gave expression to a feeling that their recommendations made to the district judge for disciplinary action to be taken against defaulting process-servers are not treated with sufficient consideration by district judges. But no concrete instances were cited. And it seems to us that in a well-ordered district judge's office the grievance is more sentimental than real.

18. But whatever be the nature of the supervision exercised over the work of the process-servers, it seems to us to be impossible to expect honest and intelligent work from the class of men whom it is possible to recruit to the process serving establishment on the scale of pay and prospects at present in force. In Bengal the scale of process-server's pay is fixed in some districts at Rs. 18—1/5—22 and in other districts at Rs. 16—1/5—20. In Patna the salaries are graded in grades of Rs. 9, Rs. 10, Rs. 11, Rs. 12, and Rs. 15. In Burma there are two grades of process-servers at a salary of Rs. 12 and Rs. 15 respectively. In the Central Provinces there are three grades of process-servers at a salary of Rs. 14, Rs. 12, and Rs. 10 respectively, while the sale amins are paid Rs. 20. In Punjab all process-servers are paid at a uniform scale of Rs. 17 per mensem. This scale of remuneration which is less than that of a cooly or a domestic servant hardly affords a living wage to the process serving staff. It is no wonder that they frequently succumb to temptation. The charges of venality and corruption which have been made against them, though undoubtedly exaggerated, have a solid substratum of truth. It is only in Bombay that the gravity of the situation has been realized and that a scale of remuneration has recently been sanctioned commensurate with their duties and responsibilities. The scale of pay in Bombay ranges from Rs. 20 to Rs. 40 for the inferior class of process-servers, with an efficiency bar at Rs. 40, and Rs. 50 for the superior class of process-servers. It was suggested by some witnesses that the adoption of the higher scale of pay would only result in greater extortion. But this is not justi-

fied by experience. The evidence in Bombay points to the conclusion that a higher scale of remuneration will attract a class of recruits of a higher social level and ensures greater intelligence, honesty and efficiency. The process-server will feel that he has something of value to lose. And the presiding officer in taking disciplinary action need entertain no apprehension, as is said to be the case in Burma, that the process-server will throw up his job light heartedly and seek a more lucrative occupation as a cooly or menial servant.

If a more literate class is recruited, as in Bombay, on a superior scale of pay and with better prospects, it will be possible to give them a training in the nature of their duties and to test their fitness for more responsible work. Apparently in most provinces process-servers are launched on their duties without any preliminary knowledge of training. In Bombay, in most districts, they are compelled to pass an examination in a text book known as "The Process-servers' manual" issued under the orders of the High Court as a condition precedent to the crossing of the efficiency bar. In the same manner if every process-server has a working knowledge of his vernacular, he can be compelled to keep a diary and write it up in his own hand. He will also be able to write up the return of each process on the spot instead of having to wait till he obtains the services of a writer.

No doubt any reform in this direction will involve some preliminary financial outlay; but in all provinces Government realizes a very handsome profit from process fees. In the province of Bengal in the year 1922 receipts from process fees amounted to Rs. 30,24,484 while the cost of process serving establishment amounted to Rs. 12,66,333 so that a net profit of Rs. 18,00,000 was realized from process fees alone in that year. The figures for other provinces are not available, but there is every reason to suppose that the net profits realized are in a proportionate scale. We think that it is only right that the litigant should get full value for the money paid for a specific purpose. Now that process fees have been enhanced in most provinces, the enhancement should not be made a source of greater profit. The State should provide for the efficient discharge of the service for which it is paid.

19. It will be convenient here to consider whether the rules for effecting service which are contained in Order V, rules 10 to 20 of the Code of Civil Procedure may not be amended in the light of the experience gained since they were enacted. Under those rules each defendant must be served and where it is practicable service must be made personally on the defendant or his agent empowered to accept service on his behalf. By rule 15 where a defendant "cannot be found" service may be made on any adult male member of his family residing with him. By rule 17 service may be effected by affixing a copy of the summons on the door of the house of the defendant provided the serving officer cannot find him after using due and reasonable diligence for that purpose. And rule 20 provides for substituted service by order

of the court where the defendant is purposely avoiding service; but this mode of procedure is seldom resorted to and the procedure provided under rule 17 is more frequently adopted in such cases.

These more or less elastic rules based largely upon English procedure have been rendered inelastic by the narrow and somewhat technical interpretation placed upon them by the courts. This will be explained presently. There are frequent disputes as to the validity of the service. Where service is denied the serving peon is usually called as a witness. If he has acted under rule 17 he frequently fails to establish that he has made any real attempt to effect personal service. The decree is set aside and the case begins all over again. On the other hand there is undoubtedly a large number of cases where the defendant has been effectively served and purposely fails to appear and after an *ex parte* decree is passed against him he applies to set it aside under Order IX, rule 13 of the Code hoping to be able to prove some defect or irregularity in the service. Even if he has no defence he puts off the evil day for a time and hopes to exhaust his opponent's resources. Applications under this rule are much too frequent and point, in our opinion, to a serious defect in the system of procedure. In the year 1922 in the province of Bihar and Orissa there were 5,500 applications for retrial or 5·2 per cent. of the total number of cases dismissed for default or decided *ex parte*. Of the total number disposed of (5,573) 19·07 per cent. were successful as compared with 35·5, 32·4, 22·3 per cent. respectively, in the three preceding years. In the province of Bengal in the year 1922, the total number of such applications was 21,711 as against a total number of 479,358 cases dismissed for default or decided, the percentage being 4·5. The applications were successful in 10,045 or 46·3 per cent These figures no doubt refer also to cases where the applications for retrial were made by plaintiffs whose suits were dismissed for default and to cases where defendants applied under Order IX, rule 13 for reasons other than non-service or improper service of summons on them. But even making allowance for such cases, they still show that in a very large number of cases the defendants were not "duly served."

20. Obviously the object of a service of a summons, in whatever way it may be effected, is to ensure that the defendant may be informed of the institution of the suit in due time before the date fixed for hearing. The vice in the procedure laid down by the Code or rather in the procedure as interpreted by the courts seems to be that it lays unnecessary stress on personal service instead of being satisfied with some other mode of service from which the inference reasonably arises that the process of the court has been brought to the knowledge of the defendant. No doubt rule 10 of Order V lays down that service of the summons shall be made by delivering or tendering a copy thereof to the defendant or to each of several defendants or to his agent empowered to accept service on his behalf. And rule 12 provides that wherever it is practicable the delivery shall be made to the defendant in person or

to his agent. But personal service is not the only mode prescribed. It is often very difficult to effect such personal service in this country, and defendants naturally attempt to avoid it. The remedy that naturally suggests itself as to the best means of obtaining an effective and speedy service is to permit other forms of service. But the opinion is general that if other forms of service are too freely resorted to the remedy will be worse than the disease. There are undoubtedly cases where the venality of the process-server is taken advantage of to make a false report and no service is effected at all. The defendant remains in ignorance and the suit is decreed *ex parte*. Frequently in such cases the suit is reopened either under Order IX, rule 13 or by a fresh suit to set aside the decree.

There is, however, no reason why the conditions should be rendered more stringent in practice than they are under the rules. We have seen that rule 15 provides that where the defendant cannot be found, service may be made on any adult male member of the family of the defendant who is residing with him. By a rule of the Calcutta High Court it is provided that in case of service under this rule there should be an affidavit of the serving officer and if necessary of someone acquainted with the facts that the defendant could not be found after the exercise of due and reasonable diligence and that the person served was an adult male member of the family of the defendant. There are also decisions by several High Courts to the effect that service under this rule upon an adult male member of the defendant's family such as his father or his maternal uncle in the absence of the defendant would not be proper service unless it is proved to the complete satisfaction of the court that attempts were made to find the defendant, that the defendant could not be found and that he was not deliberately keeping out of the way to avoid service (I. L. R. 35, Allahabad, 556, I. L. R. 30, Bombay, 623.) It seems to us that these decisions impose an unnecessary restriction on the application of this rule which is not contemplated either by the letter or by the spirit of the rule. Here again personal service is made a fetish. The real object of service is ignored. There is no reason to suppose that the knowledge of the service effected on an adult male member of the defendant's family residing with him will be withheld from the defendant. We are therefore of opinion that this rule should be amended by substituting the words "where the defendant is absent" for the words "where in any suit the defendant cannot be found."

We would point out that by the terms of Order IX, rule 13 a defendant is given a right to have the decree set aside not merely in cases in which the summons was not duly served but also where he was prevented by any sufficient cause from appearing when the suit was called on for hearing. A difficulty, however, arises on the words of Article 164, Schedule I of the Limitation Act, which provides as the period of Limitation thirty days from the date of the decree or where the summons was not duly served when the appli-

cant has knowledge of the decree. Under the general law as it at present stands a person may be duly served under the provisions of Order V, rule 15, 16 or 17 and yet it may be possible that the service did not come to his knowledge within thirty days from the date of the decree. Against this possibility there appears to be no provision (apart from Section 18) save that recently made by the High Court of Madras by rule. This rule adds to the provisions of Order IX, rule 13 a new sub-section as follows:—

" The provisions of Section 5 of the Indian Limitation Act, 1908 shall apply to applications under sub rule 1 " (*i.e.*, under rule 13, as it at present stands).

We think that if Order V, rule 15 be amended as above proposed it would be necessary to provide that in any case in which service is made on an adult male member under rule 15 such service should not be deemed to come within the words " duly served " for the purposes of Article 164 above mentioned in any case in which the adult male member had an interest adverse to the defendant in respect of the subject matter of the suit. It would remain, however, due service for the purposes of the Code, and Order IX, rule 13 would still provide sufficient safe guard in all other cases. We are not prepared to recommend the general adoption of the Madras rule as we apprehend that it would lead to a great increase in the attempts to set aside decrees.

It may also be considered whether, in provinces or among communities where women are educated or have an independent status as managers of the family business, service cannot be effected on an adult female member of the defendant's family. This alteration was suggested in evidence given before us by witnesses in Burma as desirable in respect of the Burmese. The suggestion may also be considered with reference to the European, Anglo-Indian, Indian Christian and the Parsi Communities.

21. Turning next to the provisions of Rule 17 stringent rules have been framed by the several High Courts defining what is meant by " all due and reasonable diligence " which is to be used by the serving officer in finding the defendant. Rule 27 of the Madras Civil Rules of Practice provides that if a process is affixed to the door of a house in the absence of the person to be served, the serving officer shall make an affidavit as to the following matters:—

1. The number of times and the dates and hours at which he went to the house.
2. The attempts made by him to find the person to be served.
3. Whether he had any and what reason to suppose that such person was within the house or its neighbourhood or endeavouring to evade service.
4. Whether any adult male member of the family of the person to be served was residing with him.

The Punjab High Court under its rule-making power has adopted a less rigid standard and has made the following alteration in the 3rd and 4th parts of (3) in Form 11.

"(3) The said and his house in which he ordinarily resides being $\frac{\text{personally known to me}}{\text{pointed out to me by}}$

I went to said house in and there on the day of 19 , at o'clock on the $\frac{\text{fore}}{\text{after}}$ noon, I did not find the said .

I inquired from $\{^{(a)}_{(b)}$ ..... $\}$ neighbours, I was told that had gone to and would not be back till .

The consensus of authority in all the High Courts is that, wherever reasonably possible, personal service ought to be had, that the serving officer should go to the place or places and at the times at which it was reasonable to expect the defendant would be found, that mere temporary absence of the defendant does not justify the serving officer in affixing a copy of the summons on the door of the defendant's house, that the summons should be again taken to the defendant's house to be served upon him when the inquiries made show that he is likely to be at home and to be found there, but that, where the serving officer has known that there is no prospect of his being able to serve the defendant personally within a reasonable time, he is not bound to wait and will be justified in affixing the summons on the door.

It is easy to see that when the standard of diligence is so indefinite, the service will be challenged in almost every case of service purporting to be made under Rules 15 and 17. All that the defendant against whom a decree *ex parte* has been passed has to do in order to maintain an application under Order IX, rule 13 to set aside the decree is to satisfy the court that the summons was not "duly served." It may well be that the defendant had knowledge of the institution of the suit in due time before the date fixed for hearing and yet he is apparently entitled to succeed if by exercising some ingenuity he can show that there is a technical defect or flaw in effecting the service. And the indefinite character of the standard of due diligence laid down by the courts furnishes many a loop-hole for the exercise of such ingenuity.

It has been suggested by a high authority that it should be possible to devise some other forms of service which may be permitted in all cases as an alternative to personal service in a manner which would practically ensure that the person to be served in fact received notice if living in the village where service was effected. The suggestion is that in cases arising in districts where there are headmen the process-server, if unable to find the defendant, should supply the headman of the village with a copy of the summons to be served on the defendant when he turns up after the process-server has left. The headman should keep a register of summons to be

served and should always take the thumb impression of the defendant in his register in token of such service. The advantages of this system are obvious and we trust that it will be introduced wherever possible. Another suggestion is that when service is effected at the residence of the party by attaching a copy to the door or other conspicuous part of the house, it should be done by beat of drum so as to proclaim it to the neighbours. But whatever be the process adopted it should be uniform and rigid allowing a minimum of opportunity for contesting its validity.

Before concluding this portion of the subject it may be observed that a suggestion thrown out in our questionnaire that the procedure under section 106 of the Transfer of Property Act should be applied to the service of process in civil suits has been condemned with practical unanimity by the witnesses examined before us. The difficulties in the way of the application of the procedure laid down in that section are patent. Delivery to a member of the family of the defendant may include delivery to a minor or to a female. Delivery to a servant at the residence of the defendant may be to a servant in his casual employ in which case there will be no guarantee that he will deliver it to his master and a mere affixation to a conspicuous part of the property may be subject to the numerous objections pointed out above. We do not therefore favour this suggestion.

22. Whatever alteration may be made in the rules, it seems to be imperative that Order IX, rule 13, should be amended by inserting a clause providing that no court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim.

23. With regard to processes in interlocutory proceedings Order III, rule 5, provides that any process served on the pleader of any party or left at the office or ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person. Cases are not infrequent where pleaders refuse to accept service of such processes on behalf of their clients and a considerable amount of time is wasted in effecting service through the usual channels. The rule should be amended to make service on the pleader as effective as service on the party provided such pleader is acting and not merely pleading. The Bar Committee has recommended that only such pleaders need file a vakálatnama as are acting for the parties. Our recommendation would not extend to pleaders who plead without acting. If this proposal is not accepted, we would suggest more general use of the prvisions of Order III, rule 6. The court should be given by rule a discretion to require the parties to appoint agents

to accept service of process on their behalf if they have no recognized agents residing within the jurisdiction of the court.

24. Some High Courts render it obligatory upon every party who intends to appear and defend any suit, appeal, or original petition, to file in court a proceeding stating his address for service, before the date fixed in the summons or notice served upon him as the date of hearing, such address for service to be within the local limits of the court in which a suit is filed or of the district court in which the party ordinarily resides. Rule 29A of the Civil Rules of Practice of the Madras High Court directs that where any party fails to file an address for service, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. It further provides that service affixed at this registered address in the absence of the defendant shall be deemed to be as effectual as if the notice or process had been personally served. Provision is made for a change of the registered address by a verified petition notice whereof should be given to all the other parties to the suit.

A similar rule is in force in the Allahabad High Court. It is a very useful rule especially in connection with the service of processes in interlocutory proceedings and may usefully be adopted in provinces where it is not at present in force. Such registered address should hold good throughout all appeals and after the final determination should hold good for a further period of two years for all purposes, including purposes of execution.

25. We come now to a proposal to make a general use of the post office for the purpose of serving the processes of civil courts. The Code permits service of processes by post in a very limited number of cases. Some High Courts in the exercise of their rule making powers have tentatively extended the use of the post office in specified areas. The weight of the evidence recorded before us favours the use of the post office in almost every class of cases. But this is a recommendation which, in our opinion, is rather a sign of a revulsion of feeling against the abuses of the present system than a considered recommendation of the proposal on its merits. Adopted universally, it would practically mean flying from the ills we have to others that we know not of. There is no reason to suppose that a postal peon would be less liable to venality and corruption than a process-server. But there would be this very serious disadvantage in the case of the postal peon that the postal peon is not subject to the discipline of the court while the process-server is.

It will be remembered that the Special Committee which drafted the Civil Procedure Bill pinned their faith to executive action and to service by post as the best remedies against the admitted abuses in process-serving (see the speeches in the Governor General's Legislative Council of Sir Erle Richards and Dr. Rash Bihari Ghosh at the meetings of the 6th September 1907 and 13th March 1908). By executive action they meant, in effect, more detailed

supervision by a trustworthy officer specially employed for the purpose like the inspector of bailiffs in Bombay. The other alternative, service by post, seems a handy and attractive remedy, but, used, as a general measure, in substitution for service through the peon, it would involve the following practical difficulties:—

(1) It might be necessary to increase largely the staff of postmen,

(2) Postmen are drawn from the same class as process-servers and might prove equally corruptible,

(3) Difficulties might arise in connection with the proof of service. The frequent citing of postmen as witnesses would disorganise the working of the department and objections on this ground would be raised by the postal authorities,

(4) In addition, such processes as sale proclamation, cannot be served by post and as regards the summoning of witnesses a difficulty might arise as regards the tender of diet money.

The only classes of cases in which service of process by post is permitted under the Code are service on corporations in suits against them (Order 29, rule 2-B) service on the defendant if he resides out of British India and has no agent in British India empowered to accept service (Order V, rule 25) and service of a letter in lieu of a summons on the defendant who, in the opinion of the court, is of a rank entitling him to such mark of consideration (Order V, rule 30).

Beyond this the Code does not expressly recognize service of process by post. The Bombay High Court in the exercise of its rule making power has added a proviso to Order V, rule 22, to the effect that where any summons issued by any court beyond the limits of the town of Bombay is to be served within the limits of that city, it may be addressed to the defendant at the place within such limits where he is residing and may be sent to him by the court by post registered for acknowledgment. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed by the court issuing the summons to be *primâ facie* proof of service. In all other cases the court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary.

A similar procedure has since been extended to the service of processes to be served within the limits of every headquarters town in a district. But outside the headquarters towns the post office refuses to accept responsibility. The experience gained in the Presidency of Bombay is that service of notices and summonses by post within these restricted limits is effective. The ruling in 23 Bombay Law Reporter, page 908, which lays down that if a party served by post comes to court and denies that he was ever tendered the packet containing the notices or summons and swears to that effect, the service should be declared void and the *ex parte* decree should be

set aside has acted as an effective check to the abuses of postal service and cases in which applications are made to set aside *ex parte* decrees passed after service made by post are extremely infrequent.

The High Court of Lahore have in the exercise of their rule making power added a proviso to Order V, rule 10, to the effect that in any case, if the plaintiff so wishes, the court may attempt to serve the summons in the first instance by registered post instead of the mode of service laid down in Order V, rule 10; provided always that should the defendant not appear in answer to the summons so issued the court shall have service effected in accordance with the provisions of this Order. This proviso, no doubt, may expedite the service of process in a certain number of cases but seeing that nearly 75 per cent. of the suits are disposed of *ex parte* in the absence of the defendant, the amendment in the rule can hardly be said to make for despatch on the whole as service in the ordinary way will again have to be attempted anew in all these cases.

In connection with summons sent by post it is important to bear in mind the provisions of section 27 of the General Clauses Act, X of 1897, by which it is provided that when any document is required by an Act or Regulation passed after the 11th March 1897 to be served by post whether the expression used is " send " or " give " or " serve " then the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. The High Court of Bombay accordingly held in a case in which it appeared that the posting of the packet enclosing the summons was properly addressed to the defendant and was registered, duly stamped, and posted, but the packet was returned endorsed " refused " that the court was entitled to draw the inference indicated in the said section 27 and to hold that there was sufficient service. (I. L. R. 35, Bombay, 213 and 16, Bombay Law Reporter, 204.) As a safeguard against fraud, it is provided in the Manual of Circulars of the Bombay High Court that the court, in order to satisfy itself whether the service has been duly effected or not, should require it to be proved whether the packet containing the summons was sent properly addressed and for that purpose should require it to be proved, by an affidavit or otherwise, that the defendant resided at the place to which the packet was addressed to him, at or about the time when it would reach in the ordinary course of postal service, and when the acknowledgment purports to have been signed by the defendant, should also, in most cases, require an affidavit verifying the signature of the defendant on the acknowledgment (Manual of Circulars, Rule 20, page 5).

The experience gained in Bombay is encouraging and we would recommend an extension of the service of process by post within areas similar to those within which it has been tried in Bombay. It is the practice in several provinces in India to serve notices on

creditors in insolvency proceedings by post. That procedure is said to work satisfactorily. Further, we think that where the defendant resides in British India outside the province in which the court issuing the process is situated service on the defendant by post should be recognized. Order V, rule 21, now provides only for the sending of such process either by one of the officers of the court issuing the process or by transmission by post to the court having jurisdiction in the place where the defendant resides but does not provide for service on the defendant by post. In large commercial centres with ramifications of business extending over the whole of British India, this procedure entails unnecessary delay. There is no reason why service by post directly on the defendant should not be allowed in the first instance in such cases. We would accordingly recommend an addition to the rules providing for such service.

Some difficulty has been experienced in the interpretation of Order V, rules 25 and 26, as regards service out of British India. These rules have sometimes been read as if the operation of Order V, rule 25, is excluded where a Political Agent is appointed or a court established under Order V, rule 26. This is an interpretation which is a fruitful source of delay in cities like Ahmedabad surrounded in all directions by foreign territory. The two rules are not, in our opinion, mutually exclusive. Rule 26 is cumulative and not exclusive of rule 25. This should be made clear.

With these exceptions we are of opinion that the post office should be made use of only as an ancillary mode of serving process rather than as the primary mode. In the Presidency Small Causes Court, Calcutta, and in certain other courts in Bengal the practice prevails of sending registered postcards to the defendant intimating the fact of a suit having been instituted against him, in addition to the usual process. The exclusive use of the post office would be fraught with danger. We would recommend on the whole that when a process is returned unserved in the first instance and when it is re-issued, cumulative use should be made of the post office over and above a further attempt at personal service and affixture. It may also be useful in addition to hand over one copy of the process to the party concerned who will endeavour to search out the defendant to effect personal service upon him if he can.

26. A suggestion has been made before us that vakils' clerks should be empowered to serve processes on defendants and their affidavits should be taken as proof of service. There are inherent difficulties in working out this suggestion in practice. The practical details have not been thought out by any of the witnesses who have advocated this course. The main difficulty consists in the danger of false affidavits being sworn by vakils' clerks. This difficulty can however be removed by the vakils' clerks being brought under the more effective control of the court on the lines indicated in another chapter. In the city of Bombay solicitors' clerks are empowered to serve defendants' summons and are appointed special bailiffs for the purpose by the Sheriff.

27. Next we turn to the service of processes in appeals. There is an unnecessary waste of time in service of the notices of appeal on the respondents. We have heard complaints that even notices of second appeals issued by the High Court are often returned unserved without sufficient reason. The remedy has already been suggested, *viz.*, the use of the address registered in the suit in the subsequent appeal.

While we are on the question of appeals we may refer to a certain class of cases which have come to our notice where defendants are made parties to the appeal against whom the suit has proceeded *ex parte* in the trial court. Whether such defendants are necessary parties to an appeal filed by the contesting defendant is another matter. But the necessity of serving each of these respondents with notice of appeal or of any interlocutory motion very often leads to an unnecessary delay. This is more specially the case if the appellant has obtained an interim stay of execution. It is quite easy for the *ex parte* defendant to collude with the defendant-appellant and evade service of notice thus enabling him to ensure a stay of execution for an indefinite period. A case came to our notice where more than three years elapsed before service of notice could be effected on the co-defendants. Obviously it is not, in such cases, to the interests of the appellant to expedite the service of process. The duty no doubt lies upon the court to make every effort to expedite the service of process, but courts rarely take action of their own motion. Discretion should be given to the court in such cases to dispense with the service of notices and proceed with the hearing of the appeal or with the interlocutory applications. If this procedure is adopted we think there will be no risk of prejudice to *pro formâ* respondents who did not appear in the lower court. For similar reasons we would also suggest that a rule on the lines of Order XLV, rule 9 (*a*) should be made part of Orders XLI, XLII and XLIII.

28. Turning next to the service of process on witnesses the causes of delay are practically identical with those in the service of summons on defendants, and the remedies which can be suggested are virtually on the same lines. In this connection we may suggest that considerable initial delay may be avoided if the parties themselves put in prepared processes to be served through the nazir as is the practice in Bengal. A further suggestion has been made that the witnesses' processes thus prepared should be signed by the nazir after checking the dates and sealed with the seal of the court and handed over to the parties for service on their witnesses, their affidavits being considered sufficient proof of service. It would seem that generally the parties would experience little or no difficulty in serving their own witnesses. We think this should be the ordinary rule, but in special cases for sufficient reasons shown the party should be entitled to apply to the court to get processes served on witnesses through the court staff. Something on these lines has been done in the Punjab and a rule has been framed that the court will not as a general rule issue a second process for the attendance of a witness unless

it is satisfied that the party has used reasonable diligence in getting the first process served. The system of making the parties responsible in the first instance for service of processes on their witnesses is now in force on the Original Side of nearly all the High Courts and it is sanctioned by Order XLIX, rule 1 of the Code. Our proposal is to extend the principle of this rule to mofussil courts.

But even where proper service has been effected it is not unusual for the witnesses to fail to attend either through negligence or in collusion with the party on whose behalf they have been cited where the latter is anxious to delay the proceedings. The courts have power to take penal action against such a recalcitrant witness under section 32 of the Code of Civil Procedure read with Order XVI, rules 10—13, 16—18 by issuing a warrant for his arrest, imposing a fine not exceeding Rs. 500, attaching and selling his property, or ordering him to furnish security for his appearance, and in default committing him to the civil prison. These powers, however, are scarcely ever used by the courts, because it is assumed that the parties should move the courts for the purpose and the parties are unwilling for obvious reasons to take penal action against their own witnesses. It seems to us that in such cases the parties should be offered the alternative of either applying for coercive process against their defaulting witnesses or withdrawing these witnesses if they refuse to apply for coercive process. We also think that in flagrant instances the courts themselves should on their own initiative take action against such recalcitrant witnesses and mete out exemplary punishment for contempt of the court's process. The laxity of civil courts in this respect has become a by-word and is undoubtedly one of the causes that lead to delay. There is no reason why the civil courts should not in proper cases visit a contempt of their process with the same severity as criminal courts. This, however, involves proper provision for payment of the defaulter's subsistence in the civil prison out of public funds.

It appears that in some provinces when a witness who has been summoned and attends the court and the hearing is adjourned, the provisions of Order XVI, rule 16, are overlooked with the result that a fresh summons has to issue with all the attendant delays of service. We would strongly urge that in all such cases the court should insist on the provisions of Order XVI, rule 16, sub-rule (2) being followed strictly. Under the old Code it was not clear whether the witness was bound to reattend at the adjourned hearing without a fresh summons. The point has now been cleared and by Order XVI, rule 16, sub-rule (1), the duty has been laid upon the witness to attend at each hearing until the suit has been disposed of unless the Court otherwise directs. Sub-rule (2) of rule 16 is new. It empowers the court to require any person summoned to appear and to give evidence " to furnish security to attend at the next or any other hearing or until the suit is disposed of and in default of his furnishing such security to order him

to be detained in civil prison." This is a power which the courts rarely exercise, because the parties are reluctant to take action against their own witnesses and the court is precluded from exercising the power except " on the application of either party and the payment through the court of all necessary expenses if any." We would suggest that if the party when asked by the court fails to take action under Order XVI, rule 16 (2) the court should refuse to grant an adjournment at the next hearing for the re-attendance of the witnesses except for very special reasons.

We have referred in an earlier chapter to the frequent delays in the trial of suits caused by adjournment necessitated by the non-attendance of witnesses on one or the other side. One reason why witnesses do not treat the summonses from civil courts with the respect that is due to them is that civil courts do not show sufficient respect to the convenience of witnesses. Cause lists in India are fixed with a supreme disregard of the time or the convenience of witnesses. Some courts think nothing of adjourning a case on the slightest pretext and sending the witnesses to and fro several times before recording their evidence. If a witness is sent away unexamined five times out of six he should not be blamed too severely if he absents himself the sixth time he is summoned. If it is distinctly understood that witnesses will be examined on the day on which they are summoned, the procedure relating to the granting of adjournments for the attendance of witnesses can be considerably stiffened and a great deal of delay avoided.

For instance as noted in the earlier portion of this Chapter, if the party fails to ascertain at least a week before the date of hearing which of his witnesses have not been served and to take steps to get them specially served before the date of hearing, no application for adjournment for fresh service should be allowed on the date of hearing. Again when a party applies for a process or deposits the diet money too late to allow of the witness being served in time to reach the court on the day fixed for hearing, no adjournment should ordinarily be granted to give the party a second opportunity to produce the witness. If a party fails to produce a witness whom he has undertaken to produce on a particular day, he should not ordinarily be given a second opportunity to produce him.

We think that the courts might deal in a more business-like manner with the witnesses cited before them than they generally do. If more than one suit is posted for hearing on a particular day, few presiding officers think it worth while to tell the witnesses at what particular hour of the day their suit will come on for hearing or if it will come on for hearing on that day at all. We have been told that busy men in large commercial cities have to waste their time in the Small Causes Courts till the end of the day when they are told that they will not be examined on that day and that they should attend the court a month or two later. Again, when there is a large number of witnesses to be examined in any suit, common sense dictates that

only so many of them should be summoned for a particular day whose examination can be reasonably expected to be finished on that day.

Our inquiries show that as a general rule the utmost laxity prevails in the procedure of parties and witnesses towards the courts no less than that of the courts towards the parties and witnesses. On the other hand we have come across a few instances in which presiding officers in their anxiety to show disposals have taken advantage of some technical laches of the parties in taking out process against their witnesses to throw out their suit altogether. No doubt Order XVII, rule 3, provides that where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of the witnesses or to perform any other act necessary to the further progress of the suit for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith. Our suggestions for expediting the attendance of witnesses contemplate the exercise of this power on proper occasions. But it is not a power to be arbitrarily exercised.

One judicial officer in Bengal stated before us that he was in the habit of spending an hour or so in his chambers, the first thing in the morning, while his nazir took a tally of the witnesses cited for the day. We trust this practice is not general. Taking a tally of the witnesses—a hazira as it is called—is no doubt necessary for calculating the costs of the day. The judge should not be kept waiting while the tallying goes on.

The question of amendment of the rules regarding execution processes is treated in the Chapters on "Execution."

CHAPTER 11.

Recruitment and training of Judicial Officers.

We now come to an important branch of our enquiry relating to the recruitment, training and promotion of judicial officers. It is clear that one of the principal factors in the satisfactory disposal of cases in any system of jurisprudence is the personnel of the judicial officers. This is particularly so where the system is alien to the country as it is in India and where the law to be administered is not always the law governing the persons administering it. Witnesses of eminence who speak with authority have in emphatic terms expressed their opinion before us that delay in the proceedings of civil courts in India is to a considerable extent due to want of any proper system in training the judges. This leads to want of method in dealing with the work.

2. We desire to cast no reflection on the vast mass of judicial officers presiding over the courts throughout India. On the contrary, we wish to place on record our appreciation of the magnitude of their labours, their integrity and the conscientiousness with which they discharge their duties. We realize to the full the hard work done patiently and uncomplainingly. The nature of that work is not sufficiently known to the public and deserves description. The suits decided by judges with jurisdiction superior to that of a munsif are of all degrees of complexity. Those decided by munsifs are somewhat simpler, but they are far from being simple in many instances, and their determination requires great capacity on the part of the presiding officers.

3. The conditions under which subordinate judges and munsifs work, especially in outlying sub-divisions, are often trying to a degree. In many places the court houses are badly ventilated, badly lighted and cramped, and the houses available for the residence of the officers are small and uncomfortable. Congenial society is not to be secured in many of the smaller places. Climatic conditions are not always favourable. In spite of the difficulties of the work and the conditions under which it is performed, the outturn is good. These officers work hard and work loyally. But once they commence their judicial duties, they have little time and less opportunity to make up for original lack of training.

4. Beginning with the lowest grade of judicial officers, the munsifs or corresponding officers are directly recruited in practically all the provinces from among graduates in law. In most provinces practice at the Bar for a period of three years is insisted upon, but in some of the provinces such practice is not a *sine qua non*. Selection is made usually by a selection committee which consists of a committee of all the judges of the High Court as in Madras or a committee of three judges as in Allahabad, or by a

mixed committee of judges and lawyers as in Bombay. The Committees in Allahabad and Bombay grant interviews before making the selection. In certain provinces, as in Madras, the High Court enjoys statutory powers to appoint munsifs and the Local Government does not intervene until the time comes for them to be made subordinate judges. In Bombay the Local Government and in Sind, the Commissioner in Sind, have the statutory power to make the appointments but they generally act upon the recommendations of the selection committees. In Bengal (with Assam) Bihar and Orissa and the Province of Agra all appointments are made by the Local Government on the nomination of the High Court under statutory rules framed by the Local Government in consultation with the High Court and sanctioned by the Governor General in Council. In Oudh the appointments are made by the Government after consultation with the Judicial Commissioner. In Burma and the Central Provinces and Berar the Local Government and the Local Administration respectively have control.

It is only in the Province of Burma that recruitment is made to any appreciable extent from among ministerial officers, fifteen per cent. of the vacancies amongst township judges being filled by selection from among ministerial officers of not less than eight years service. On rare occasions, we understand, appointments are made in Madras from among the members of the clerical establishment who have passed at least the first grade pleaders' examination.

5. With regard to the selection of munsifs it may be stated that a wholly competitive test as the exclusive avenue of appointment is not practicable nor has it been generally advocated by the witnesses examined before us. But criticisms have been addressed as to the methods of nomination generally in vogue as leading to favouritism and other evils. Several witnesses considered that it would be advisable to associate one or two non-officials, *e.g.*, leading members of the Bar with the judges on the selection committee. This is the Bombay practice and is said to work well there. Whether it can be introduced with advantage in the circumstances of any particular province must be determined with reference to the local conditions. We are not prepared to make a general recommendation.

6. A suggestion was made to us that candidates from the districts should generally be selected by the district judges in consultation with the local Bar associations. The district judge finds himself embarrassed by applicants whose work he has never had a chance of judging for himself. The practice of the junior pleaders, if any, is mainly confined to subordinate courts. If the district judge were to associate with himself the senior subordinate judge of the station and the president of the local Bar association ex-officio in considering the applications of the several candidates and were to forward the applications with the joint recommendation of such a local committee. the selection committee at head-

quarters would have a more reliable guide as to the comparative merits of the applications than at present. This suggestion has our approval.

7. We are of opinion that the possession of a law degree should be made an indispensable condition of appointment. Except in Burma, we think that the recruitment from the ministerial establishment of persons who have not graduated in law should cease.

8. The rule in force in certain provinces requiring candidates to have practice at the Bar for a period of three years or more furnishes no guarantee that the candidate has acquired any really useful experience. Whatever period be prescribed there are objections to extending the requirement beyond three years.

Accordingly we would suggest that an examination should be held to test the candidate's practical acquaintance with law and procedure with special reference to his ability to draft pleadings, appreciate evidence and write judgments. A simple method would be to give the candidate records of some decided cases. He should then be required to draft the issues and write the judgment, discussing the law including the case law applicable to the facts. This in our opinion would be a most excellent test. It has not been applied in any of the British provinces so far, but we understand that in the State of Mysore it is in force, and has led to most satisfactory results.

9. We are strongly of opinion that a modified form of competition of this character among the nominated candidates should be one of the elements in the selection of munsifs especially in provinces where previous practice at the Bar for a certain number of years is insisted upon. The kind of competition which we have recommended is not a mere test of theoretical or book knowledge but a practical test in qualities which make for a good judicial officer. It is not unlike the competition prescribed for aspirants to judicial office in France and other continental countries whereas in India the judiciary is mainly official.

10. We make this recommendation with the less hesitation as persistent complaints were made to us that recent nominations in several provinces have not been made from the best material available. It seems to us that if competition in some form is introduced, criticism of this kind will be disarmed. On the other hand we see no reason to apprehend that appointments made after a modified competition on the lines we indicate will not satisfy all reasonable claims. A certain percentage of appointments may be set apart, if necessary, for special communities or interests. A high revenue official of the United Provinces stated before us that a competitive examination as a means of recruitment for deputy collectors in that Province gave practically the same caste results as nomination. For the two years for which statistics were available he said that out of nine Hindus recruited by competition two were Brahmins, two Kashtriyas, one Vaishya, one Khatri, and three Kayasths, a proportion by castes which was more or less the same as the proportion taken by nomination. He added that

the competition included a *vivâ voce* examination in which marks were given not only for general alertness, but for family claims and for the candidate's personality. We were told that in Allahabad during the interviews of candidates for munsifships the candidates' history, their record of usefulness in college as organisers, monitors or prefects or captains of games and so on, their services in the military department, if any, etc., are taken into account.

11. On the whole then we are of opinion that the best method of selection from among the candidates nominated from the districts, according to the scheme we have above suggested will be by introducing an element of competition of the nature we have described and we do not think that there will be any danger of communal claims being overlooked while there will be every likelihood that the best material available will be selected.

12. Turning next to the question of probation of munsifs, the Royal Commission on Public Services recommend that all direct recruits on the judicial side should undergo a period of probation which they fix definitely at two years. They suggest that an addition should be made to the cadre by the creation of a definite grade on lower rates of salary in order to enable the recruits to obtain experience before they enter upon their actual duties. Such a period of probation is essential in provinces like Bihar and Orissa where candidates are recruited shortly after they take their law degree. An elaborate scheme of probation extending for a period of two years has there been provided for newly joined recruits. The object in view is that munsifs on probation should be given as much experience as possible of judicial (civil and criminal) and revenue work and also of the management and control of an office and that they should also master the books which are set for examination and should study closely legal works, the codes and the authorized law reports. For this purpose six months in the aggregate are allotted for training in the offices of a munsif and a subordinate judge and in case work in such courts; one month to training in general revenue work; two months to training in magisterial work; three months to training under the district and sessions judge; three months to training in the conduct of cases and six weeks to training in survey at the school of engineering and seven and a half months to training in survey and settlement under a settlement officer. The training in office work in the munsif and subordinate judge's office is devoted to the acquisition of practical experience of the administrative work of a civil judicial office, the probationer being required to obtain a thorough knowledge of—

(*a*) the registers maintained in the offices of the munsif and the subordinate judge and in the nazarat, account, record room and copying department.

(*b*) the classification and arrangement of papers in the records of suits,

(*c*) the preparation of monthly, quarterly and annual statements,

(*d*) the preparation of decrees,

(*e*) the system of distribution of processes in the nazarat, and,

(*f*) the arrangement, examination, preservation, and destruction of records deposited in the district judge's record room.

13. The probationer is also required to make a careful study of the High Court general rules and circular orders making a particular study of the account rules. By way of training in judicial work the probationer is made to sit with a munsif or a subordinate judge as the case may be during the trial of cases; to record the depositions of the witnesses, prepare a synopsis of the pleadings, make a summary of the oral and documentary evidence, take notes of the arguments of the pleaders and write a decision discussing the law (including case law) applicable to the facts of the case. The records prepared by the probationer in at least 12 munsifs' cases and four subordinate judges' cases are submitted to the munsif or subordinate judge who after examining them gives suitable directions and advice. The district judge also examines a few records so as to give instructions and to become acquainted with the merits of the officer.

14. The training in the revenue work is given in the office of the collector who arranges for facilities being given to the probationer to acquire a general acquaintance with the rules, practice and procedure of the revenue department in (*i*) land registration and certificate procedure, (*ii*) partition, (*iii*) cess and revaluation, (*iv*) land revenue sales and (*v*) treasury (judicial transactions only). The training in magisterial work is given under the directions of the district magistrate and during this period the probationer is required to read the High Court general rules and circular orders (criminal), important portions of the Penal Code and the Code of Criminal Procedure and take special notes of the procedure in respect of directing and sanctioning prosecution for offences under Chapters 12 and 18 of the Indian Penal Code. Court work on the lines of the training in the court of a munsif or a subordinate judge is also required from the probationer who, subject to the approval of the High Court, is vested with the powers of a magistrate of the third class.

15. The training under the district and sessions judge consists of training in judicial work (civil and criminal) and in administrative work. The probationer is required to prepare a synopsis in a selected number of appeals not yet heard, tracing the case law and indicating the statutory provisions bearing upon the facts of the case and discussing briefly the evidence on the material points arising in an appeal with reference to its relevancy and cogency. The probationer also attends a few sessions trials selected by the sessions judge and watches the proceedings so as to acquire familiarity with the practice and procedure of sessions trials. The probationer during this period is expected to render himself thoroughly familiar with the practical work-

ing of the rules and procedure in the English and vernacular departments of the office of the district judge and when he has had some experience of the office he is deputed for educational purposes only to inspect the offices or specified departments thereof of subordinate courts.

16. Then follows the three months training in the conduct of cases under the government pleader or public prosecutor, when the probationer is expected to prepare the case, attend the hearing in court and take notes of the trial. Lastly there is the training in survey and settlement the primary aim of which is to secure for the probationer an insight into agrarian life and interests and a close acquaintance with the preparation of a record of rights. The training includes instructions in theoretical and practical survey, especially chain survey, compass survey, levelling and the use of the theodolite.

17. It is provided that the High Court will not recommend an officer for confirmation unless (*i*) the district judge under whom he has been trained certifies that he is fit to be so confirmed having regard to his mastery of the law and practice of evidence and procedure and his industry and general efficiency, (*ii*) the district magistrate and collector and the settlement officer and the officer in charge of the survey certify to his industry and efficiency in the work in which he has been trained by them.

18. In Burma as we have seen, fifteen per cent. of the vacancies in the subordinate judicial service are filled by promotion of selected ministerial officers of the High Court and the district courts, the remaining appointments being filled by direct recruitment from among graduates and practising lawyers of the first or second grades of not less than five years standing. The vacancies for ministerial officers are filled by selection from among the clerks of not less than eight years service of the High Court and the district courts. Selected ministerial officers and practising lawyers do not undergo any special training as their experience as clerks or pleaders is supposed to take the place of training. But they are put on probation for two years and are appointed at once to the charge of a township court. They are also required to pass the High Court examination in law by the lower standard, and, if they do not pass this examination within two years, or if their work is otherwise unsatisfactory, their services are dispensed with before the end of the period of probation. Graduates appointed direct to the service are appointed on probation and are not usually confirmed until the end of two years. They are sent for training to the headquarters of a district under an experienced district judge and are appointed additional judges of the township courts and additional magistrates of the third class. They are given petty cases, both civil and criminal, to try themselves and they are also required to listen to cases in the township, subdivisional and district courts. This sort of training ordinarily lasts a year and then the officer obtains a township court of his own, but the

exigencies of service sometimes necessitates the shortening of the period of training. The officer is required to pass the High Court examination in law of the lower standard before he completes his second year of service.

19. Obviously the elaborate scheme of training described above is neither necessary nor desirable in the case of munsifs selected after a period of three to five years practice at the Bar. The judicial side of the training may well be dispensed with in their case. But we are emphatically of opinion that they should be given a course of training and practical experience of the administrative work of a civil judicial office. The training should be on the lines of the training in office work given to the probationers during the first six months of their probation in Bihar and Orissa which has been described above. It seems to us that it is most undesirable that a young munsif should have to learn this branch of his work from his munsarim or reader from whose domination, he generally finds it difficult to shake himself free. We would therefore recommend that a training course for this class of officers should be held at headquarter stations for a period of, say, three months preferably during the vacation and instructions should be given by a retired officer from the provincial civil service. Such instruction was actually given with good results by an officer in the Punjab provincial judicial service.

20. Next we turn to subordinate judges or subordinate judges first class as they are called in Bombay. At present they are almost invariably recruited by selection from among the senior munsifs. A suggestion was made to us that there should be also direct recruitment to a certain percentage of subordinate judgeships from the Bar. But we are not in favour of this suggestion. It will dishearten the munsifs who look forward to promotion to the grade of subordinate judges and have in many provinces to wait as long as twelve to fifteen years to attain that position. On the other hand there is no compensating advantage in direct recruitment from the Bar to subordinate judgeships. Selection must necessarily be made from among the most senior pleaders, but the most capable amongst them who command an extensive practice will decline the office and an inferior candidate will have to be accepted.

21. It is only in the province of Burma, so far as we are aware, that direct recruitments are made on any large scale to subordinate judgeships. The subordinate judges constitute the provincial judicial service of the Province and sixty per cent. of the appointments are filled by direct recruitment from among university graduates with honours and practising pleaders of the first and second grades while the remaining forty per cent. of the vacancies are filled by promotion from township judges who form the subordinate judicial service. Presumably, as the qualifications of township judges, improve direct recruitment to the provincial judicial service in Burma will gradually cease.

22. We have said that subordinate judgeships are selection posts filled by promotion from among munsifs who have crossed

the efficiency bar. In this connection we should like to draw attention to the remarks of the Public Services Commission as to the manner in which promotion to selection posts should be made. They say " It should be provided that promotion into selection posts or into a different class, for example from munsifship into subordinate judgeship, should be made on similar principles to those on which selection is made for first appointment to the judicial branch, *viz.*, by committees of selection." It was pointed out to us that at present in practically all the provinces promotion to subordinate judgeships from the most senior among the munsifs follows as a matter of routine. It was said that crossing the efficiency bar has become a mere formality, hardly one officer out of fifty being passed over. The result, it was alleged, was a steadily growing deterioration in the personnel of subordinate judges leading to disorganisation in the work of the subordinate courts. We are not in a position to say what truth there is in this allegation. If there is any truth in it we would advocate that a selection committee should be formed for promoting munsifs to be subordinate judges. The committee should examine, say, ten judgments in important cases written during the two previous years, ascertain the quantity of contested work in which judgments were written, apply the test of appeals and then decide whether a particular officer is fit for promotion to a subordinate judgeship.

23. Subordinate judges promoted from the munsif's grade require no special training whether in their administrative or their judicial duties. But when, as in Burma, a large percentage of them are recruited direct from university graduates or practising pleaders some form of training is necessary. Practising pleaders on appointment to a subordinate judgeship are placed at once in Burma in charge of a sub-divisional court and are not required to undergo any special training, but they are required to pass the law examination by the higher standard before confirmation. Graduates on appointment are placed on probation for two years and during this period they have to pass the law examination by the higher standard. At first for six months they have to undergo exactly the same sort of training as do graduates appointed to the subordinate service. At the end of six months they are placed in independent charge of a township court and then at the end of a year, if their work has been satisfactory in the township court, they obtain a sub-divisional court.

24. Assistant judges and joint judges constitute a grade of judicial officers peculiar to Bombay. They are posted to district courts where the work is heavy to render assistance to the district judge like additional judges in other provinces. The jurisdiction of the assistant judge is, however, more limited than that of the district judge, his original jurisdiction extending to suits of not more than Rs. 10,000 in value. Within this limit he is vested with jurisdiction to try all suits and original proceedings which lie in the first instance in the district court. He is also

vested with civil appellate powers and is generally an assistant sessions judge. The joint judge has jurisdiction in both civil and criminal cases co-extensive with that of the district and sessions judge, but can only try such cases as are transferred to him by the latter. Joint judges are always promoted from assistant judges. The usefulness of these appointments as a training ground for the office of district and sessions judge, whether for officers promoted from the provincial civil service or selected from the Indian Civil Service, will be referred to presently. We need only mention here that assistance to congested district courts is given in Bombay by assistant judges and joint judges at far less cost than by the additional district judges in other provinces.

25. Assistant judges in Bombay are selected either from among subordinate judges first or second class or appointed direct from the Indian Civil Service and are promoted in the ordinary course to be joint judges. In making a selection from among subordinate judges generally speaking, no preference is given to seniority and merit is made the sole criterion. The selection is usually made from among the senior second class subordinate judges at a stage in their service when there are reasonable prospects of their appointment to district judgeships before retirement.

26. Next we come to district judges and additional judges of district courts. The present practice in all the provinces is that district judges are principally recruited from the Indian Civil Service, a very few appointments being filled by promotion from the provincial civil service and one or perhaps two being filled by direct recruitment from the Bar. In the province of Burma out of twenty-two posts of district and sessions judges six are held by officers promoted from the provincial service and three are held by barristers recruited direct from the practising Bar and the rest by members of the Indian Civil Service.

27. Officers promoted from the provincial service and barristers recruited direct receive no special training on appointment to district judgeships. In all provinces except Bombay, officers of the provincial service officiate off and on for several years as district and sessions judges before confirmation and the barristers are in the first place appointed on probation. In Bombay they are appointed in the first instance to be assistant judges and sessions judges and acquire experience in that capacity for several years before being placed in charge of a district.

28. With regard to recruits from the Indian Civil Service it is only in the provinces of Burma, Bombay and the Central Provinces that they receive at present a course of regular training in original civil work before they are appointed district judges. In Burma all members of the Indian Civil Service on arriving in the country receive at least one year's training in their duties as revenue officers and in the trial of civil and criminal cases. In their first year of service they have to pass departmental examinations by the higher standard which examinations include a stiff examination

in criminal law and an easier examination in civil law. At the end of about five years of service every Indian Civilian is asked whether he would like to join the judicial side. If he expresses a desire to become a judicial officer he is released for judicial training at the beginning of his sixth year of service. During his period of training he is sent to the headquarters of a district and is made an additional judge of the subdivisional and township courts. He is made to attend the hearing of cases in the district court and he tries cases from the subdivisional and township courts. At the end of the six months he is placed in independent charge of a subdivisional court where also he has to try criminal cases as a special power magistrate. At the end of a year he is made an additional judge of a busy district court and little later on an additional sessions judge. His period of training is ordinarily supposed to last eighteen months, when he is considered fit, if he proves suited to the judicial side, to take charge of a district and sessions court and he then gets a district when a vacancy occurs. The above is a normal training received by an Indian Civil Service officer. During the period of their training Indian Civil Service officers have to pass the High Court law examination by the higher standard. We understand that of recent years some officers have got off with a much shorter period of training, but that has been due to the lack of recruiting during the war and the unusual number of vacancies which had to be filled up.

29. In Bombay the training of civilian officers proceeds on somewhat similar lines. After the fifth year of their service officers who elect for or are allotted to the judicial side of the service are released for training for judicial work. They are appointed assistant judges and attached to district courts to be trained by selected district judges. Cases are transferred to them from the courts of first and second class subordinate judges and they are required to try a certain number of such cases. They are required to render themselves familiar during this period of training with civil law, but no course of reading is prescribed nor is any examination held to test their proficiency. Recently one officer has been deputed for training to the High Court and watches the proceedings on the Original as well as the Appellate Side making notes of evidence, and of the arguments and is required to write judgments which he submits to the Advocate General who gives him such instructions as he thinks fit. After undergoing training for a period which generally lasts for one year, the officer is posted as an assistant judge in a heavily worked court, invested with civil appellate powers and the powers of an assistant sessions judge, and renders assistance to the district judge much on the same lines as an additional district judge does in other provinces except that his original jurisdiction is limited to suits under Rs. 10,000. In time he is posted as a joint judge with powers co-extensive with those of a district judge and after being employed on judicial duty of this character for a period ranging from three to five years, he is appointed a district and sessions judge, when a vacancy occurs.

30. In all the other provinces the civilian officer undergoes no preliminary course of judicial training and from a joint magistrate or a sub-collector he is at once posted as district and sessions judge. The defects of this system are obvious. No amount of ability or industry can compensate for the absence of training in civil law and procedure or qualify the civilian officer at one step to be the principal court of original civil jurisdiction and the principal court of first appeal in the district. The serious drawbacks of the situation thus created have long agitated the minds of the Indian authorities and the Government of India in a letter to the Secretary of State, No. 16, dated Simla, the 4th July 1907, recorded their opinion of the situation in these emphatic terms:—

> "It would be difficult to exaggerate the political dangers of the present situation or the importance of effecting a material improvement in the capacity, training and status of the Indian Civil Service judges. It is impossible at any rate in the advanced provinces to justify a system under which a gentleman, who has no knowledge of civil law and who has never been inside a civil court in his life, can be and often is at one step promoted to be a judge of appeal in civil cases and to hear appeals from subordinate judges who are trained lawyers with years of legal experience. Incompetent men cannot retain their position in the face of a well founded criticism which is becoming more and more searching as time goes on. On public grounds it is imperative that drastic steps should be taken to remove this blot on our administration."

31. The position so graphically described in this despatch of the Government of India, has led to a demand in some provinces for a complete exclusion from the Indian Civil Service cadre of all the superior judicial appointments and for recruitment to be made from the Bar; in other provinces to a more moderate demand for a material curtailment of recruitment of judges from the Indian Civil Service in the immediate future and its gradual abandonment. The various phases of this controversy were reflected in the evidence given by witnesses of all classes before various Royal Commissions in India and found an echo in evidence given before us. This, however, raises large questions which we do not consider to be fairly within the scope of our reference.

We proceed on the assumption that for many years to come the larger percentage of district and sessions judgeships will have to be recruited from the Indian Civil Service cadre and we go on to consider what is the best form of training that should be given to members of the service in order to qualify them for these posts.

32. This question has engaged the attention of the Government of India and the Secretary of State for several years past. In his Despatch No. 151 (Public), dated the 28th October 1910, Lord

Morley indicated that the system of training of those civilians who elect for or are allotted to the judicial branch of the service should secure:—

(1) that judicial officers should enter upon their duties with an adequate equipment of legal knowledge,

(2) that they should be enabled to acquire judicial experience at an early stage of their career, and

(3) that facilities should be given them for extending their knowledge of law by special study at a later stage.

33. The first of these objects, it was proposed, to attain by extending the period of training in England for probationers of the Indian Civil Service and by elaborating the course of instruction in law during that period. With this object in view, the Public Services Commission strongly recommended that the period of training of probationers in the Indian Civil Service should be extended to a period of three years, so as to secure a satisfactory preliminary training for the professional work of an Indian Civil Servant in India, whether serving on the executive or on the judicial side. The necessity for an adequate legal equipment for officers in either branch of the service was emphasized by the Government of India in Paragraph 4 of their Despatch No. 16, dated the 4th July 1907 in the following words:—

> "We would preface our remarks by pointing out that in every branch of the duties on which an Indian civilian is employed a knowledge of law is necessary. Law is the basis of our whole system of administration. Not only as a magistrate or as a judge, but also as a revenue officer, the civilian deals with a system of codified law; he must be acquainted with the procedure of civil justice and must be prepared to meet the questions raised by skilled legal practitioners. As an executive officer, he must be able to apply enactments to facts, must be expert in the law of contracts, must be competent to conduct executive investigations in accordance with legal methods, and not infrequently he requires sufficient legal skill to draft rules that will have the force of law. Not only his conclusions, but the methods and procedure by which he arrives at them are open to the light of criticism and must be legally valid. Most important of all, he must know the legal limitations of the extensive powers that are entrusted to him. From the very commencement of his career in India, the young civilian is in part a lawyer and in a part a judge. If, however, we contrast the circumstances of the present day with those of a generation back, the considerations at once suggest themselves that the law which the modern civilian is called upon to administer is far more complicated, while the legal profession has vastly increased in numbers and has attained a far higher standard of training. At the same time the

knowledge of law possessed by the natives of India generally, and their disposition to appeal to the courts wherever possible, has gone through a remarkable development. The question therefore naturally presents itself: What legal training has the civilian of the present day for the important duties which devolve upon him? The answer, we fear, is somewhat as follows:— He has read in England the Indian Penal Code, the Code of Criminal Procedure and the Evidence Act. That may be the sum total of his legal knowledge. He need have learnt nothing of the underlying principles of law. He has not even seen the inside of a court. When he arrives in India he is subjected to a desultory and unscientific form of training which consists of learning by heart more Codes and of doing a little practical work. He then takes his seat on the bench where he has to cope with lawyers highly trained in law and endowed by nature with subtlety and ingenuity to an uncommon degree. The natural result follows. Some time or other he has to deal with a case presenting more than usual difficulty in which a subtle lawyer is engaged. Being conscious of his ignorance he becomes flurried and makes errors of all kinds. Then he is pilloried in the press which in this country is controlled by the legal profession to an extent scarcely paralled elsewhere and thus English justice is brought into contempt. We do not think that this picture is over-drawn..... It is unnecessary for us to elaborate the subject further. We have said enough to demonstrate the truth of our contention that there is urgent necessity for improvement and that unless some remedy can be found the influence and reputation of the services and of the Government itself are bound to suffer."

34. The proposal of the Public Services Commission to remedy the evils so graphically described is that during the extended period of probation, which they recommend, law should be made the principal field of study throughout the whole period, and that it should approximate, as closely as circumstances will permit, to the Honours School curriculum in this subject. They add that a detailed knowledge of the Indian Codes can be acquired by officers in the course of their daily work. What they should take with them from their university is a firm grasp of the legal principles on which Codes are based and a knowledge of comparative law which will stand them in good stead in dealing with further problems as they arise. They further recommend that probationers should be made to attend the law courts during their probation and to report cases, civil and criminal. They also suggest that it would be a good thing if probationers were called to the Bar during their course. They point out that this would present no difficulties to a young man who is actually studying law at his university up to the Honours standard and that the gain in after

life would be great. These proposals are under the consideration of the Secretary of State and awaiting his orders. All that we need say is that the evidence recorded before us points to the necessity of a more intensive legal training during the probationary period than is at present in force, more especially for Civilians who eventually adopt a judicial career.

35. The second object of the training indicated by Lord Morley is that Civilians who elect for or are allotted to the judicial branch of the service should be enabled to acquire judicial experience at an early stage of their career. With this object in view the Government of India in their letter No. 548, dated Calcutta, the 30th March 1911, addressed to all Provincial Governments, with the concurrence of the Secretary of State suggested the following scheme which they said was in its main outlines in force in the Bombay Presidency, *viz.*:—

(1) that Civilians shall be trained for the higher posts in the judicial line by being employed on subordinate judicial duty (*i.e.*, on judicial duty in posts below that of a district and sessions judge) in the earlier years of their service before their first furlough falls due;

(2) that all superior judicial posts shall ordinarily be reserved for officers who have undergone this course, as soon as such officers become available, provided that they have shown themselves to be qualified for the judicial line;

(NOTE.—This does not refer to appointments from the provincial services or direct from the Bar.)

(3) that officers who have been through this course and have shown themselves qualified for judicial employment shall be given facilities for studying law in England by the grant, on fairly liberal terms, of study leave to be combined ordinarily with furlough—the study leave being granted usually so as to end when the officers are ripe for appointment as officiating district and sessions judge;

(4) that in order that Government may be able to select officers for the judicial line, a somewhat larger number of officers than are actually required for service later as district and sessions judges shall be put through this course of subordinate judicial duty.

36. After a prolonged correspondence with the Secretary of State and with the Local Governments, the Government of India in their letter to all Provincial Governments, No. 2628-C., dated Delhi, the 3rd April 1914, communicated their decision arrived at with the approval of the Secretary of State to introduce a tentative scheme, pending the report of Public Services Commission, whereby they directed that steps should be taken in every province to employ continuously on civil judicial work for about eighteen months, as many selected members of the Indian Civil Service of

not less than five years' service as may be required and as can conveniently be spared. They observed that the main object to be borne in mind is to enable a civilian at the most impressionable period of his service to acquire a greater practical knowledge of civil law than is possible under existing conditions. Unfortunately this scheme has not been given effect to systematically in any of the Provinces except Bombay and Burma. In the other provinces a few spasmodic attempts were made to put it in practice and then given up. A few civilians were trained as munsifs and subordinate judges in Madras. Special posts for training junior civilians were created or set apart in the United Provinces. The war intervened and recruiting for the judicial line temporarily ceased. The scheme formulated with so much care by the Government of India remained a dead-letter.

37. The Public Services Commission in accepting the scheme as a satisfactory solution of the problem, recommended that the decision whether a civilian officer should be allotted to the judicial side should be arrived at as soon as possible after the completion of the fourth and at latest before the completion of the sixth year of service. We are of the same opinion.

38. It is unnecessary for us to elaborate the details of the preliminary training in original civil work which, as we have seen, has now been finally settled by the Government of India with the approval of the Secretary of State as indispensable for a civilian officer before he is appointed to a district judgeship. Each province will be in the best position to arrange the necessary details to suit local conditions. But we would emphasise the importance of placing the young civilian in entire charge of a munsif's or a subordinate judge's court during a certain period of the training so that he may render himself familiar not only with case work but also with execution work and the administrative duties of the court. He will thus be in a position to supervise and control effectively the work of subordinate courts in all branches when he is appointed to be a district judge.

39. Turning lastly to the third object set forth in Lord Morley's despatch, *viz.*, that facilities shall be given to junior civilians for extending their knowledge of law by special study at a later stage, the Government of India have framed rules for giving assistance to officers on leave in the United Kingdom who wish to prosecute their legal studies at the Inns of Court or at the King's Inns, Dublin. The concessions are:—

(1) advance of all fees payable for admission,

(2) a bonus of £25 for each 1st class in any of the four examinations comprising Part I and £50 for a 1st class in the final examination or Part II of the examination prescribed by the Council of Legal Education,

(3) a further bonus of £75 in part refund of any fee actually paid to a practising barrister in England for reading in

chambers, the period of reading to be not less than one year inclusive of long vacation.

We understand that a certain number of civilians have already availed themselves of these concessions in certain provinces and have returned to India after being called to the Bar and completing their course of reading in a barrister's chambers.

CHAPTER 12.

Commercial Litigation.

1. No attempt need be made to define exactly a "commercial cause." When the "Commercial Court" was established in England in 1895, commercial causes were explained to include "causes arising out of the ordinary transactions of merchants and traders; amongst others those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking and mercantile usage."

2. The most important commercial litigation in India is confined to the principal seaport towns. In Calcutta, Bombay, Madras and Rangoon such suits, if of considerable value, are decided on the Original Side of the High Courts. In Karachi they come before the Judicial Commissioner's Court in its district court jurisdiction. Cases of lesser value are decided by the city civil court in Madras and small cause courts in the presidency towns, Rangoon and Karachi. The conditions in the High Courts are dealt with in another chapter of this report.

In the city civil court of Madras and the presidency small cause courts the judges have special opportunities of knowing commercial law and of obtaining experience in its administration; they have the assistance of a Bar which enjoys similar advantages.

An appreciable and increasing number of commercial suits, however, are filed in other places. At present no special machinery is provided for their trial. They fall to be decided by district judges, subordinate judges and munsifs according to the valuation. Such places are Delhi, Amritsar, Cawnpore, and Ahmedabad. There are other places where such suits though not numerous are increasing in number. The officers in charge of these courts have usually, when they are first entrusted with the decision of commercial cases, no special knowledge on the subject. When transactions have been conducted according to the practice of European business firms, the presiding officer is frequently handicapped by unfamiliarity with English commercial law, English business methods, and even English business phraseology. His want of equipment is an obstacle to speedy and efficient disposal. In addition there is often a scarcity of legal practitioners in these places, who know very much about the subject. As the result of experience, conditions have recently grown slightly better than they were. But when presiding officers have learnt something of this class of work they have in ordinary course to be transferred and the new officers posted in their place have to start again from the beginning. The new-comers now may have the advantage of assistance from a more experienced Bar. Even where special efforts have been made to meet the situation, it cannot be said that conditions are as yet reasonably favourable to the despatch of commercial suits

on business-like principles. Commercial suits " drag their slow length along " as slowly as or even more slowly than other suits.

3. The following case illustrates the manner in which commercial litigation is apt to be disposed of in such places as we have described. The plaintiffs were a Manchester firm who dealt in piece-goods. They had shipped goods to India in accordance with an order from the defendant and issued in addition a draft upon him payable in October 1920. The defendant accepted the draft on presentation, but did not meet it on due date. The plaintiffs issued two notices to the defendant. The suit was instituted on the 4th March 1922. On the 23rd March the defendant filed his written statement to the effect that he was acting not as a principal, but as a commission agent. He stated that he had accepted the draft without consideration to oblige the plaintiffs. He put the plaintiffs to proof over the whole matter. It was not until the 23rd May 1922 that the evidence was led. The plaintiffs owing to ignorance as to the questions that were likely to arise in the litigation had omitted to bring from England copies of correspondence and did not apply for the defendant to produce the originals until the 8th June 1922. Further, they were not ready with their evidence at the right time. The result was that a commission had to be issued to England and copies of the letters required had to be obtained from England after proof. The commission was not received back till the 5th October 1922 and the plaintiffs' representative had to return to England during the hearing of the suit before his evidence was recorded. His evidence was not recorded until the 15th December 1922. The plaintiffs' case was then closed nine months after the suit had been instituted. On the 15th December it was the duty of the defendant to open his case. He had no evidence ready and he was granted an adjournment till the 30th January 1923 to produce his evidence. He had no witnesses ready on that date and was given another adjournment for the purpose till the 21st February 1923. On that date some of his witnesses were present and the others sent a communication that they would not attend the court because the grandson of a friend of theirs had died. This was apparently considered as sufficient reason for their non-attendance. Two of the defendant's witnesses were heard on that date and the 12th March 1923 was fixed for the hearing of the remainder. On that date four more witnesses were heard and the 22nd March was fixed for hearing further evidence. The case went no further as after the 22nd March 1923 it was settled out of court.

4. From the year 1920 until at least some time in 1922, if not later, an enormous and rapid increase in commercial causes produced an intolerable state of congestion in certain High Courts, *e.g.*, Bombay and in certain other courts, *e.g.*, in Delhi. For the moment we are concerned only with commercial litigation outside the great seaport towns The consequences of the breakdown of our judicial system which resulted from its inability to cope with this sudden mass of commercial work have been so serious both to

English exporters and to the credit of India as to compel attention to the urgent need for some reform.

It will not be expected of this Committee that it should undertake to make for itself a reliable and accurate description of the trade conditions which produced the breakdown. It is of some importance for our present purpose, however, that the highly exceptional character of these conditions should be appreciated. We cannot accordingly do better than quote some passages from the report dated July 1921 of His Majesty's Senior Trade Commissioner in India and Ceylon.

5. " The year 1919-20 was a year of phenomenal trade activity, both in the United Kingdom and in India. I use the adjective advisedly as the trade boom of that year was entirely abnormal, was based on unsound foundations and gave rise to a fictitious prosperity, the false nature of which subsequent events have only too amply proved. In the United Kingdom, manufacturers were inundated with the accumulated orders of nearly five years of war from all parts of the world and were obliged, in many cases, to decline lucrative business owing to their output being booked for months and even years ahead. The cost of living rose steadily resulting in further labour demands and there appeared to be no limit to the upward trend of prices for all classes of goods. In India, the monsoon of 1919 had been a good one, trade was brisk and both exports and imports attained record figures, the value of the former exceeding that of the latter by no less than 56 per cent. This enormous balance of trade in India's favour synchronising with a rise in the price of silver during the year from 48½ pence per ounce to 89½ pence per ounce forced up the exchange value of the rupee well above two shillings.

" The end of the war found India with depleted stocks of foreign merchandise and with five years' arrears of purchases to make good. Moreover, she had accumulated very considerable buying power, as the country emerged from the war in a generally prosperous condition. The rise in exchange considerably enhanced this purchasing power. The natural result was that orders on a prodigious scale were placed in the United Kingdom, United States, Japan and other countries. The bulk of these purchases were made at the highest levels of prices.

" In February 1920, the Indian Currency Committee Report was published and the trading community learnt that it was recommended that the rupee should have a fixed exchange value of one rupee = 11·30016 grains of fine gold, that is, one-tenth of the gold contents of the sovereign.

" * * * * * * * * The report of the Currency Committee and the subsequent sales of Reverse Councils created an impression in the minds of many people that they might look forward to a period of high rates for some time ahead. Further purchases of goods were made in overseas markets and the bulk of these orders were for delivery during the year 1920-21.

6. "The past year opened, therefore, at a time of feverish activity and apparent general prosperity, but the boom proved to be a very short-lived one. In the United Kingdom, manufacturers found in the early summer of 1920 that not only were there no further indents forthcoming at the price levels they were forced to quote, but the impoverished state of the world began to be apparent and appeals for cancellation of existing contracts came in from all the great consuming markets. This state of affairs became steadily worse and resulted by the end of the year in the wholesale curtailment of industry and unemployment on an unprecedented scale.

"India, being dependent on Europe and the United States for the sale of her produce, was soon affected by the changed conditions. The internal disorganization and financial chaos in and the adverse exchange rates ruling with Central Europe brought about a complete cessation in demand for Indian exports such as jute, cotton, hides and oilseeds, which are the backbone of the export trade. The process of deflation of prices in the United States and the United Kingdom not only checked fresh purchases, but entailed very heavy losses on stocks of tea and other commodities. Russia remained isolated from the rest of the world. The severe industrial crisis in Japan resulted in a marked falling off in her consumption of Indian cotton. The monsoon of 1920 was a poor one and the average rainfall over the plains of India as a whole was 12 per cent. below normal. The country was also suffering from many internal difficulties due to the results of war such, for instance, as the serious shortage of rolling stock on the railways, which hampered the movement of crops for export. All these causes contributed by the end of 1920 to bring about one of the most acute periods of economic depression which had been experienced in India for decades.

"In the meantime, the enormous volume of high-priced goods ordered at various times since the Armistice arrived at Indian ports in unprecedented quantities, the gross total value of the imports during the year being actually double the average of the five preceding years. This flood of imports coinciding with a slump in the export trade resulted in an excess of imports of merchandise of 79 crores and a net balance of trade against India of 49 crores. The price of silver in London fell from 72*d.* to 30*d.* per ounce during the year, and the effect of these two factors was a collapse in exchange for rupees from 2*s.* 4*d.* (Telegraphic Transfers) on April 1st, 1920, to 1*s.* $2\frac{7}{8}$*d.* (Telegraphic Transfers) on March 7th, 1921.

"Importers were consequently faced in most cases with extraordinarily heavy stocks of piece-goods, metals, hardware and general imports purchased at the top of the home market at a time when exchange was in the region of 2*s.* or over, and these goods arrived to a stagnant market with exchange standing at about 1*s.* 3*d.* or 1*s.* 4*d.* In most cases importers and dealers were either not able to, or were unwilling to fix exchange at the time of placing the

order, with the result that they had to meet losses varying from 50 to 70 per cent. on the cost price of the goods. Moreover, inasmuch as prices in the producing centres had fallen considerably, there was the additional menace of their being undersold by more recent purchases.

7. " Seeing that they were obliged to face losses which, in many cases, they were utterly unable to meet, the Indian importers in Bombay, Delhi and elsewhere sought for a means of escape. The first move was taken by the Native Piece-goods Association of Bombay, which body—in December, 1920—passed a resolution pledging its members to refrain from settling any contracts at a lower rate than two shillings to the rupee; on the grounds that they had been misled by the Government statement to the effect that the Currency Committee's recommendations advocating the linking of the rupee to gold at the ratio of Re. 1=1/10 of the gold content of the sovereign would be adopted. This was followed by the passing of similar resolutions in Delhi, Amritsar and other markets. Most Indian importers in these centres declined to accept their drafts, failed to meet them at due date and refused to take delivery of the goods unless at an exchange rate of 2*sh*. The result has been a complete deadlock and utter stagnation in the market, which has lasted for very many months, but which is showing signs of gradually clearing. The burden of the strain has been borne by the banks, who have been saddled with a steadily increasing volume of overdue bills, almost all of which have been discounted on the other side. It is estimated that the value of the repudiated and overdue drafts in all India and Ceylon some months ago reached the stupendous total of £30,000,000. The banks have adopted throughout a most helpful and broadminded attitude. They realised that to enforce their just claims by actions in the courts would merely have precipitated a severe crisis which would have delayed recovery indefinitely. Accordingly, they have contented themselves with pressing their clients as far as was reasonably possible and holding the bills until such time as the market improved. There has been, to all intents and purposes, a moratorium, and importers in many cases have not yet been forced to meet their losses. In the meantime, in many instances, settlement has been effected by compromise and the granting of compassionate allowances by home shippers and the importing firms in India. There still remain (July, 1921) an enormous number of repudiated and overdue bills in the hands of the Banks. Of these, probably over 50 per cent. represent piece-goods shipments, and in view of the shortage of imported piece-goods throughout India, it is hoped that—given a good monsoon—the greater portion will be cleared before the end of the year.

" The future almost entirely depends on a good monsoon, which would bring prosperity to the cultivator, would reduce food prices and would stimulate demand. The prospects so far are promising, and it is hoped that there will be a great clearance of imported goods this autumn. The losses to be liquidated, however, are so heavy that it is only to be expected that there will be a residuum

of dealers utterly unable or unwilling to meet their commitments. It is possible therefore that we may see a number of failures towards the close of the year. On the whole, however, there is ground for hope that the situation will be cleared up without any undue shock to credit conditions.

8. " As a result of the increasing general prosperity of India and the spread of education and knowledge among the Indian mercantile community, a distinct tendency towards direct trade between Indian importers and overseas suppliers has been one of the features of the past few years. This movement has been particularly noticeable in Bombay, and also in the inland distributing centres such as Delhi, Amritsar and Cawnpore. There is no doubt whatever that it has contributed materially to the extension of British trade in India, and it would appear to be a tendency which is likely to grow. London, Manchester and other home export houses have in the past been prepared to ship to approved Indian indentors, usually on D/P (documents against payments) terms, the branches of the exchange banks in India maintaining the drawer's lien on the goods until the drafts were met. In certain cases the goods were shipped, documents against acceptance. The banks have greatly facilitated the trade in up-country centres such as Delhi and Amritsar by clearing the goods through to destination and by storing them until the drafts were honoured.

" It is a most noteworthy fact that the difficulties in the recent crisis have been greatest in those centres such as Delhi and Bombay where the most liberal financial and trading facilities have been granted by British exporters to Indian importers and bazar dealers. Liabilities have been repudiated and drafts dishonoured on a scale hitherto unknown. It is only natural that home firms, who have hitherto been willing to accept indents direct from bazar importers and to draw on them in the usual manner, should be doubtful whether the trade is worth carrying on if the Indian importer has no hesitation in refusing to meet his bills when the market goes against him and he is faced with a heavy loss."

9. In the face of this description of the conditions, indignation and astonishment at the failure to provide prompt justice can perhaps be overdone. Legal machinery cannot rapidly be duplicated. The local pleader and the mofussil judge cannot suddenly become commercial lawyers. Rules specially adapted to commercial litigation cannot be dealt out rapidly upon an emergency. No trade was more seriously affected than the piece-goods trade and in such places as Delhi and Amritsar the trade in piece-goods is an enormous proportion of the total import trade. When it becomes usual for contracts to be broken the law must carry on, but to make it a success is no easy matter. Still it cannot be said that the seriousness of the position was at all promptly realised or that additional judges were provided as early as they might have been. Nor in our opinion is a bank or shipper holding an accepted bill without a grievance if he finds himself obliged to sue in a court which is without any power of giving summary judgment or

of requiring in a proper case the immediate deposit of the amount of the bill. Here again any action taken was taken late. Order 37 was applied to the courts of the district and subordinate judges in Delhi as from July 1923.

10. These criticisms however do not touch upon the main cause of scandal. What most astonished English merchants was the facility with which a defendant was able to protract proceedings by making difficulties over service, by setting up defences without merits, by disputing everything however obvious or irrelevant, by failing to produce documents which he must necessarily have had, by making vague charges of fraud and otherwise putting the plaintiff to futile expense and entangling the proceedings. Serious complaint has been made before us—in particular as to Delhi. It is asserted that at every stage in these courts there was unnecessary delay, and that service of processes could not be effected even upon persons who conducted business in premises as well-known as the court-house itself. It is asserted that every description of frivolous and futile plea was raised to delay decisions, that the production of unnecessary evidence was insisted on, and that the cases dragged on and on, until in many instances the plaintiffs withdrew their claims because their patience was exhausted. Complaints were made of the unfamiliarity shown by the presiding officers as to business terms and principles, and of their inability to exercise in a business-like manner their power to order the sale of the rejected goods.

11. Here we may quote from the Senior Trade Commissioner's Report for 1921-22.

"*Congestion in the Indian Courts.*—It may be wondered how it is that in a market such as British India, which is supposed to enjoy the benefits of British Justice, losses can be incurred on such a scale without legal satisfaction being obtained through the courts. The reason is that many commercial courts, notably those in upcountry markets such as Delhi and Amritsar, are so congested that delays of many months—indeed years—occur from the time a suit is filed to the date on which judgment is given and these delays are even greater in the case of appeal to a High Court. It is common knowledge among Indian merchants that, in case they default, their creditors are deterred from filing suits against them owing to the length of time required to obtain a judgment. Even when a judgment is obtained, it is frequently found that the debtor has made over his property to his wife or else he absconds and further interminable delays are experienced in tracing him. In any event, very little satisfaction is obtained. During the past two years, dealers have been defiant and have challenged their creditors to sue them, knowing full well that the latter would not be able to obtain satisfaction within a reasonable time. As a result of representations, additions have been made to the staff of subordinate judges in Delhi, and it is hoped that some relief to litigants has been afforded. It is pointed out that the delay in the disposal of commercial cases is due, not so much

to the procedure of the courts, as to deliberate obstruction by litigants, and as Indian courts (outside the Presidency towns) have themselves to dispose of all the preliminaries to a suit, this obstruction is difficult to circumvent. All the same it is to be hoped that Local Governments may see their way to consider the possibility of expediting civil cases."

12. We have examined these complaints at length, and, where it has been possible, have obtained records of the suits to which reference is made. It is perhaps of small consolation to know that many of these complaints might have been voiced by litigants in any contested suit in Delhi or elsewhere. The representatives of the British firms had had no previous experience of courts in India and would certainly have been as dissatisfied, if the suits had not been of a commercial nature. It is not in the least just to throw the blame upon the judges. As a matter of fact, the courts in which most difficulty occurred were presided over by particularly capable officers. It is quite unreasonable to expect them to have responded to the emergency. Dishonest pleas cannot be summarily overruled: they have to be tried. Mistakes in handling were certainly made and made too often. But a very large number of suits was instituted which, added to the other work, overburdened the courts. The suits were of a description, familiarity with which could not reasonably have been expected either of the presiding officers or the local Bar and in face of a multiplicity of confused and dishonest pleas the merit of the simplest cases became obscure. Order 37 of the Code which provides for summary judgment in cases upon bills of exchange did not then apply to any mofussil courts except in the Madras Presidency, even if the six months' limitation would have allowed of its application to these cases. Discovery, moreover, is the weakest spot in almost every up-country court.

13. Further, certain English representatives who had come to India to look after the cases had themselves no great knowledge of what was requisite. They had come to India unprepared with the necessary materials, and were not able personally to instruct their counsel to advantage. They cannot be blamed altogether for this, for they expected that all that was necessary was to place their cases before persons, who would be as qualified to handle them as a solicitor engaged in commercial business. Further, they had not anticipated that the defendant would put them to the proof of certain matters, which it may safely be asserted, would have been admitted as a matter of course in England. Had they known these facts before they left England, they would have furnished themselves with copies of correspondence and with other documentary evidence and would have been prepared to meet the situation. As it was, they found too late that it was necessary to get further proof from England. The defendants for the most part played for delay and were not scrupulous as to their methods. In the terrible condition of the market many of them were fighting with their backs to the wall.

Some who had bought exchange in advance on account of their purchases had in the meanwhile gambled in exchange and were no longer covered. "It must be admitted that in the boom of 1919 and 1920 credit facilities had been given in many cases to Indian firms who were not of sufficient standing to warrant them" (Report of H. M. Senior Trade Commissioner for 1920-21, page 5).

14. That most English firms—at least after they had time to appreciate the nature and extent of the crisis—were ready to bear a substantial portion of the loss in order to obtain a settlement seems clear enough. The great majority of claims were in fact liquidated in this way. Indeed we were informed that consignees in Calcutta, particularly Marwari consignees, were reasonable and did their best to meet their obligations. Representatives of the exporting firms have informed us that they did not desire to have recourse to the courts against persons who were incapable of paying and that they were at all times willing to settle at a heavy sacrifice. From this we infer that many of the defences and objections put forward to obstruct the course of suits were put forward by defendants who could pay but who utilised delay as a method of bargaining and to extort unreasonable concessions. This presumably accounts also in part for some at least of the quasi-political excuses. We cannot therefore wonder if a strong feeling of indignation at the methods of the Indian Courts forms one element in the damage done to Indian credit by the experiences of 1920-21. There are still people in India who do not understand why commercial suits should have any special expedition; it may be hoped that much further experience will not be necessary in order to convince them. We have reason to believe that the dilatoriness of courts is still employed by purchasers in a falling market to extort concessions to which they have no claim, moral or legal.

15. Where there is a prospect of courts having to deal constantly with suits of a commercial nature, some provision should be made in advance to ensure that a sufficient number of officers have the necessary training to enable them to undertake the duties of a commercial judge. Apart from such exceptional conditions as obtained recently in Delhi and other places it is a safe forecast that commercial litigation will tend to increase in many of the smaller towns in India, notably in the Punjab, Bombay, United Provinces and Burma. The oscillations of trade must be provided for. With an increased development we must expect an increase in commercial litigation. Company matters, partnership matters, as well as suits connected with the export and import trade will provide more work for courts as time goes on. What happened in Delhi may happen again. In our opinion each administration should consider carefully as to the places at which it would be advantageous to provide for courts having a special competence in and familiarity with commercial work. It does not seem to be open to doubt that they will be required in Delhi, Amritsar, Cawnpore and Ahmedabad and that they will shortly

be required in other places. Arrangements should be made without delay for giving to a reasonable number of officers in the subordinate judiciary a training to fit them to handle commercial work. It is unreasonable to expect an officer whose legal training has been directed in a large measure to enable him to cope with land disputes in the mofussil to decide commercial suits with satisfaction to the business community, unless he is given the means of obtaining an insight into the way in which commercial litigation can be and should be carried on. It has been suggested that the experiment of sending a few selected district or subordinate judges to England should be commended to the notice of the Local Governments as a means of enabling these officers to receive some training in commercial law and practice. This certainly would be admirable but it would probably be regarded as unduly expensive. We think that much might be done if arrangements could be made to send certain selected officers to become familiar with commercial business in the courts of the Presidency towns. It might well be possible to arrange with firms of commercial solicitors to permit such officers to be attached to their firms to learn at first hand how a commercial suit ought to be prepared and presented, the orders that are usual as regards interlocutory matters, the way in which such cases are presented to the court by an experienced Bar and decided by High Court Judges. This method, if practicable, would certainly be better than a system by which such officers were merely attached to a court. If, however, the administrations concerned can be induced to see that commercial work requires different methods from those suitable to a mofussil land suit and that it is necessary in the interests of the trade of the country to improve the manner in which commercial disputes are heard, these administrations will not, we think, find much difficulty in settling the details of a scheme from which some improvement might be hoped.

16. It seems to us that so long as plaintiffs in important commercial suits are required to resort to courts at centres like Cawnpore or Ahmedabad, it is entirely unreasonable to withhold from the subordinate or district judges who have to try such suits, the power of giving summary judgments in proper cases and of making such orders as to security for the plaintiff's claim as alone can prevent unreasonable obstruction by defendants who have no real defence. We think that the High Courts outside Madras have been apt to be somewhat timorous in this matter. This is not unnatural, considering that Order 37 has hitherto been regarded as providing a highly special and drastic procedure. To the English lawyer familiar with Order 14 of the Rules of the Supreme Court, the provisions for summary judgment are not anywhere suspected as tending to hardship upon defendants. The proper method of working such provisions is not difficult to learn. At least since the Bills of Exchange Act of 1855 they have been in steady application in the County Courts as regards bills of exchange, and in

the High Court as regards liquidated claims. Mofussil courts which require to be made commercial courts in the sense above explained should as a rule be armed not only with the power to give summary judgment upon bills of exchange but with like powers in all or most of the cases mentioned in section 128, sub-section 2, clause (*f*) of the Code of Civil Procedure. The period of limitation should be extended as we suggest in the Chapter on "Limitation." Summary procedure is not an arrangement for giving special expedition to one plaintiff at the expense of another as a matter of favouritism. Its primary object is not to give precedence to a plaintiff in a case in which there is a real defence requiring to be tried but to protect the plaintiff in a proper case from being put to delay and expense where there is no defence or no such defence as to make this reasonable unless terms are imposed. The real difficulty about this form of practice is not that it produces hardship to defendant but that it very often fails to give adequate protection to the plaintiff.

17. We would point out that when an application is made for leave to defend and is refused, provision should be made requiring the court to give summary judgment there and then. The defendant in such a case, should be in exactly the same position as regards appeal or revision as if decree had gone against him after trial.

CHAPTER 13.

Arbitration.

1. The law as regards arbitration may be said to consist of the Second Schedule to the Civil Procedure Code and the Indian Arbitration Act of 1899. The provisions of the Second Schedule to the Code are substantially the same as certain sections in the Code of 1882. The note made by the Special Committee over which Sir Erle Richards presided in 1907 was as follows:—

> "We are of opinion that the best course would undoubtedly be to eliminate from the Code all the clauses as to arbitration and insert them in a new and comprehensive Arbitration Act. There are perhaps difficulties as to this at present. We have determined, therefore, to leave the arbitration clauses much as they are in the present Code; but we have placed them in a schedule in the hope that at no distant date they may be transferred into a comprehensive Arbitration Act."

That this hope has not been fulfilled, although sixteen years have elapsed, is certainly a pity, but it is important to observe that what is required is not so much that the whole of the law, on this subject, should be put into one Act, as that the law should be made more workable.

2. The importance, especially in commercial matters, of a prompt and workman-like system of arbitration requires little emphasis in a report such as this, in which the law's delays are the main subject matter. The fact that a debtor can postpone judgment or execution for a very long time by taking advantage of elaborate procedure and congestion in our courts, is not merely to be regarded as giving rise to injustice in an individual case or cases, but must be viewed as a general source of risk and expense which has to be provided for out of the gross profits of every trade affected. In so far as an arbitration system may be made prompt and effective, the public can expect to get its goods cheaper. In so far as the enforcement of contracts for the sale and purchase of goods is uncertain, dilatory and expensive, the public, when it buys, must expect to have included in the price a certain sum as premium, or as reserve, against this form of risk. Whether, without some system of arbitration, business would be possible or not, *ceteris paribus* it would not be possible at the present levels of prices. It is, therefore, in the interest of the Indian consumer, as well as in the interest of persons engaged in commerce, that Indian trade should have the advantage of a workman-like system of commercial arbitration.

In the buying and selling of goods there is always a special necessity for arbitration. So far as the ordinary law goes any variation between the goods tendered and the contract description entitles the buyer to reject. In foreign trade especially rejection of goods is a very serious matter. Accordingly in many trades the

usual form of contract provides that even if the goods should fail in some respects to satisfy the contract description, an arbitrator or arbitrators may nevertheless require the buyer to accept them subject to an allowance. This is a very important stipulation from a seller's point of view.

3. A main feature of our Arbitration Law is that we have two systems—one for mofussil India, and the other applicable to centres of trade and commerce—chiefly the Presidency Towns. This double system applies, however, only to arbitrations that are carried out independently of any suit or proceeding in a law court and to the enforcement of awards made in such arbitrations. When parties have once gone to law and a question arises of taking the decision of the matter in dispute out of the hands of the court and giving it to an arbitrator or arbitrators chosen by the parties, the law applicable to this process is substantially the same for the whole of India. The first and broadest question, therefore, is whether as regards arbitrations, which are carried on, or are agreed to be carried on, independently of any suit, it is practicable to establish one and the same law for the whole of India,—that is, for the mofussil as well as for the commercial towns. If so, it would seem that the Indian Arbitration Act, which applies to towns, would require, with some modifications, to be extended to the mofussil, superseding in this respect certain provisions in the second schedule of the Code. It would certainly not be practicable in Calcutta, Bombay or Karachi, to revert to the rudimentary provisions of the second schedule of the Code. The project of extending the principles of the Act of 1899 to the whole of India is as old as the Act itself. So far the weight of opinion has always been against the proposal.

I

Arbitration under a submission.

4. The Indian Arbitration Act of 1899 though technically it extends to the whole of British India, was expressed to apply of its own force only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency Town. By section 2, however, Local Governments with the previous sanction of the Governor General in Council were empowered by notification to declare the Act to be applicable in any other local area as if it were a Presidency Town. Since 1920 the sanction of the Governor General in Council has not been necessary. The Act was immediately applied to Karachi (1899). Thereafter it was applied, but on certain special terms, to Delhi (1909), to Cawnpore (1912), and to Amritsar (1915). The Government of India was apparently of opinion that the Act of 1899 was not entirely suitable for every variety of arbitration proceedings in such towns as these. It would only sanction the application of the Act in these mofussil centres on condition that merchants should not come under its terms unless they had agreed to go to arbitration *under the Act*. The Act accordingly

applies only " to written agreements, submissions or references thereon, in which the parties expressly declare that it should apply" (*cf.*, Punjab Act I of 1911). In like manner by the United Provinces Act I of 1912 it is enacted by section 2, that for the purposes of the Indian Arbitration Act, 1899, and notwithstanding anything to the contrary in the definition of the word " submission " as given in section 4 (*b*) of that Act " submission " shall mean a written agreement to submit present or future differences to arbitrators under the Indian Arbitration Act, 1899, whether an arbitrator is named therein or not.

Recently (March 1923) the Act has been extended by the Madras Government to Tuticorin.

5. Under the Indian Arbitration Act, the scheme of arbitration law is roughly this—that if parties have made in writing an agreement to refer, then, upon dispute arising, one party may require the other to comply with his agreement; to appoint, or concur in appointing, an arbitrator, or umpire; to lay the dispute before the arbitrator, or arbitrators, for decision; the award, when made, has only to be filed in court by the arbitrator, in order that it may become capable of being carried into execution as though it were a decree. If one party to a submission refuses to appoint an arbitrator, or refuses to come before the arbitration tribunal, when established, the system broadly speaking is that the party insisting upon arbitration may have the arbitration carried on *ex parte*, and the award will be equally binding. Under this system if any question arises as to the validity of the submission, or the jurisdiction of the arbitrators, or as to the regularity of the proceedings, the party objecting has various courses open. One is to try by obtaining an injunction to prevent the arbitration proceedings from taking place, or from being brought to a conclusion. A second is to wait until the award is made, and then apply to the court to have the award set aside or declared to be void. There is, however, a third course which in recent years has been much resorted to by parties who desire to defeat an agreement to refer, namely, to institute a suit about the matter in dispute—usually a suit for a declaration of some sort—the object being that as the matters in difference are thus brought before a court of law, arbitration proceedings will become fruitless, or will, at least, have to be suspended for many months until some questions of procedure are settled at first instance or on appeal. Another form of procedure, much affected of late, is to wait until the award is being put in execution by transfer to some mofussil court for the purpose, and then to launch a suit in the mofussil, asking for an injunction to restrain the execution, and for a declaration, *e.g.*, to the effect that the submission was obtained by fraud, that the arbitrator misconducted himself, and that the award is not binding on the plaintiff.

6. The scheme of the Indian Arbitration Act of 1899 is, in many cases utterly ineffective in the sense that a person, who has no defence to a just claim, who has agreed to refer all such matters to arbitration, and against whom an award has been made in terms of

his agreement, may, nevertheless, defy the other party, not for months only, but for years, by means of one or other of the methods above referred to. In all the courts, which have to administer the Act of 1899, the advantages of arbitration can for practical purposes be abolished by bringing a suit to set aside the award as distinct from an application under the Act. According to the rules of most High Courts applications under the Act are more or less summary, and are intended to be disposed of with a certain promptitude.*

So long, however, as the plaintiff takes care to raise some question affecting the validity of the submission, it is settled law that he is entitled to proceed by way of suit. There is difference of opinion as to whether it would be open to him to bring a suit merely for the purpose of raising an objection of the type contemplated by section 14 of the Act, *e.g.*, misconduct of the arbitrator; and there is also room for difference of opinion as to whether such a question can be agitated in a suit, provided that the suit raises other questions affecting the validity of the submission. The one safeguard to be descried, in the Act, against the action of a party desirous of defeating an agreement to refer is the provision that the award, when filed, shall be capable of execution as though it were a decree. Accordingly it is in the power of any court, staying execution under the award or prohibiting the plaintiff from carrying on execution, to require the party against whom the award has been pronounced to give security in cash, if necessary, as a condition of depriving the plaintiff of his *primâ facie* right to execute the award. For one reason or another the courts in India do not appear to succeed in utilising this weapon with sufficient effectiveness to put an end even to impudent attempts to defeat and delay just claims upon awards.

7. In the city of Karachi, the scheme of the Indian Arbitration Act would appear to break down more constantly and in more striking fashion than in any of the Presidency Towns. Merchants in Karachi do a great deal of business with the Punjab; commercially speaking the Punjab is the hinterland of Karachi. In almost every trade the common form of contract employed contains a submission clause. It has happened, owing in recent years to the ups and downs of the markets, that arbitration has resulted in awards being made in favour of the Karachi merchant, and against the upcountry dealer. Until comparatively recently the safeguard to which we have referred—namely the fact that the award, when filed, is under

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Karachi.

Rules Nos. 1 to 11 made in substitution of Nos. 1 to 10 of Chapter XII, with effect from 21st June 1923.

Madras.

Rules 517—527 being Order XXXVII.

Bombay.

Chapter XXIII, Rules 354-63.

Calcutta.

Chapter XXIII, Rules 3-17.

the Act capable of execution at once as though it were a decree—was entirely overthrown by certain rules of the Judicial Commissioner's Court. By these rules notices were issued to the parties; the party against whom the award was made was invited to take objections, and a more or less protracted litigation was embarked upon on the question whether or not the award should 'stand filed.' Apart from such proceedings, subordinate judges in the Punjab are readily induced to grant interim injunctions, frequently *ex parte*, restraining the execution of awards. These injunctions, however misconceived, can be relied upon to occupy many months before being ultimately discharged. We have been assured that, from the Karachi merchant's point of view, it would appear possible to have the execution of an award delayed almost indefinitely by proceeding from one court to another in the Punjab, obtaining injunctions, the discharge of each of which would involve much time and in some cases would necessitate resort to the High Court at Lahore.

8. Particular instances of protracted litigation arising out of agreements to refer may be given to show the reality of the evil. We may first take the case which resulted in a ruling of the High Court of Lahore, reported in I. L. R. 3 Lah. 296. Messrs. Jai Narain Babu Lal apparently carried on business as piece-goods merchants at Karachi, with branches at Amritsar and Delhi. They would seem to have sold piece-goods under written contracts which contained an arbitration clause, providing for a reference to arbitration by two European merchants of Karachi. In 1918, before the Armistice, they entered into several forward contracts with certain Delhi merchants, for the sale of piece-goods to be supplied in the beginning of 1919. After the Armistice in November 1918, the piece-goods market fell very heavily. The buyers declined to take delivery of the goods, pleading that they were induced by fraud to enter into the contracts, and that the goods tendered were not of proper shipment, and were otherwise in disconformity with the contract. In April or May 1919, the sellers called upon the different buyers to refer the dispute to arbitration. *It is to the proceedings that ensued upon this that we desire to call attention.* The Delhi buyers filed suits in Delhi for a declaration that the contracts were not binding on them, and for an injunction restraining Messrs. Jai Narain Babu Lal from going to arbitration. On the 9th October 1919 the District Judge of Delhi, granted temporary injunctions against Messrs. Jai Narain Babu Lal. These injunctions were discharged by Mr. Justice Abdul Raoof on the 23rd of December 1919 [*vide* 54 I. C. 546.] But pending an appeal against his decision under the Letters Patent, temporary injunctions were again issued by the Lahore High Court which were discharged on the 23rd of February 1920 by a Bench consisting of Sir Shadi Lal and Mr. Justice Martineau [*vide* 55 I. C. 406]. Pending appeal against the interlocutory orders, the plaints filed by the Delhi merchants were returned to them for making certain amendments and were readmitted in May 1920 as suits of 1920. These suits were dismissed on 13th October 1920 on the ground that the plaintiffs had no cause of action at that stage, and that in

the event of awards being passed against them the Delhi merchants could then come to court to set them aside. The Delhi merchants appealed against the decision of the subordinate judge dismissing their suits. There was delay in serving Messrs. Jai Narain Babu Lal and the disposal of the appeals hung fire for a long time.

After the discharge of the injunctions by the Lahore High Court, Messrs. Jai Narain Babu Lal served fresh notices on the Delhi merchants calling upon them to appoint their arbitrators. Some of them did so under protest. The arbitrators passed their awards in January 1921. The Delhi merchants thereupon filed fresh suits for a declaration and injunction, *inter alia* claiming to have the awards set aside on the ground that the arbitrators had no jurisdiction to proceed with the matters in dispute pending the disposal of the appeals filed in the first set of suits. They also filed objections to the awards in the Karachi Court and applied that the hearing of the objections be stayed under Section 10 of the Civil Procedure Code, pending the disposal of the second set of suits filed by them in the Delhi Court. Under the rules then in force in the Judicial Commissioner's Court at Karachi no award could be executed as a decree pending the disposal of objections to the award. The applications for stay were disallowed. Revision applications against this decision were subsequently dropped. In the meantime the buyers expedited the disposal of the second set of suits in the Delhi Court and obtained a decision in their favour setting aside the awards on the preliminary point that the arbitrators were "*functi officis*" during the pendency of the appeals in the first set of suits. The Punjab High Court reversed this finding and remanded the suits for disposal on the merits (*vide* I.L.R. 3, Lahore, page 296). The objections to the award were then proceeded with in Karachi and were disallowed. On 27th June 1922 revision applications against the decision of the Karachi Court were also disallowed. Though the awards could then be enforced as decrees, Messrs. Jai Narain Babu Lal had still to fight the Delhi suits on the merits and though they may have been able to plead in the Delhi Court that the decision of the Karachi Court was binding, there was still plenty of scope for further delay in the Delhi Court and they not unnaturally compromised the matter. So far as we are concerned the buyers may or may not have had an excellent case for contesting their liability to go to arbitration, but the possibility of such a chain of proceedings as is above set out is in itself proof that our arbitration law is ineffective.

9. Further illustration may be given of the manner in which arbitration clauses can be rendered nugatory by the misuse of the principle laid down in the well-known English case, Doleman *v.* Ossett Corporation (1912), 3, K. B. 257, namely that arbitrators cannot proceed to decide a dispute if there is a suit pending about the same dispute, unless stay of the suit has been obtained from the court in order that the arbitrators might decide the matter. It is not uncommon for debtors to institute suits in the Punjab in respect of the same matter as is the subject-matter

of arbitration in Karachi. Applications for stay of such suits take a very long time. In certain cases suits for accounts were filed up-country against the Karachi claimants in arbitration. The Karachi claimants applied to the up-country court for stay under section 19 of the Indian Arbitration Act, and proceeded with the arbitration. On the awards being filed in the Judicial Commissioner's Court at Karachi, they were set aside on the principle above mentioned, but on appeal the awards were ordered to be taken off the file and to be represented to the Court in the event of the stay application being granted [*vide* 17 Sind Law Reporter, p. 225]. We were informed, when at Karachi, that it sometimes takes from two to three years in up-country courts to have an application under section 19 finally disposed of. It is not uncommon for the up-country suits to be filed after the arbitrators have entered on the reference and just a day or two before they make their award. Thus in the Karachi case numbered J. Mis. No. 297 of 1921, the reference to arbitration is dated 29th April 1921, the award is the 18th May 1921, and the suit is the 14th May 1921. The effect of such tactics is frequently to oblige claimants to settle for a much smaller sum than that to which they are entitled.

10. The Associated Chambers of Commerce discussed the question of arbitration at a meeting in December 1923, and urged upon Government that steps should be taken to put the law of arbitration in India into a more satisfactory state. We observe that Mr. R. S. Backhouse of the Karachi Chamber was of opinion, first, that the provisions of section 15, to the effect that the award on being filed shall be enforcible as if it were a decree, should be modified; and also that provision should be made in the Indian Arbitration Act to the same effect as is made by paragraph 17 of the Second Schedule to the Code—namely that the party claiming arbitration may apply to the court, and the court after giving notice to the several parties concerned may make an order of reference if the agreement to refer appears to be valid. Mr. Backhouse pointed out very forcibly certain of the defects of the Indian Arbitration Act, in particular the failure to provide a right of appeal in cases arising in towns other than the Presidency Towns. He also called attention to such rulings as E. D. Sassoon and Co. *v.* Ram Datt Ramkrishan Das, I. L. R. 50 Calcutta 81, and the case already referred to Jai Narain Babu Lal *v.* Jamal, I. L. R., 3 Lahore, 296, which seem to permit unlimited right of suit about awards.

11. We have been furnished with a copy of a draft Bill to consolidate and amend the law relating to arbitration in British India, prepared by Mr. Harchandrai Vishandas, of Karachi. Apart from minor amendments of the law and from the fact that the whole law of arbitration is intended to be incorporated into one Act, the general intention of the Bill appears to be to apply the principles of the Indian Arbitration Act of 1899 to the whole of India, making however certain modifications. The main modifications seem to be (1) that an award may be enforced as a decree, but only by leave of the court, such leave to be obtainable only after the lapse of

a certain time in order than an application to set aside, modify, or remit the award may be made meanwhile; (2) that no suit should lie to contest the validity of a submission or award on any ground other than fraud; and (3) that no award should be deemed to be invalid by reason only of its being based on a reference which, amongst other matters, includes the subject-matter of a pending suit or proceeding.

12. On the whole, we think experience shows that arbitration is an extraordinarily ineffective device in the absence of a fairly high degree of honesty in the parties. If the result of a submission clause is that one party to defeat the arbitration will always allege fraud, or misconduct of the arbitrator, or something else, no provision of the law will ever succeed in securing a quick settlement of disputes. The simple fact seems to be that the more carefully the law be amended the more ingenuity will be applied in making allegations of a kind which courts of law cannot refuse to investigate at length. We doubt whether mofussil India is ready for, or requires, a system of arbitration any more elaborate than is provided for by the Second Schedule. We would recommend rather that the law, under the Indian Arbitration Act, should be made more drastic and effectual, than that it should be extended.

13. What seems to be most required is that in the case of every arbitration one court and one only should be the forum in which all questions relating to the validity of the award should be finally determined. It is, we think, necessary to require all persons, who desire to challenge awards made by arbitrators in Presidency Towns and other commercial centres, to bring their proceedings in the court of the town. There seems to be no hardship, whatsoever, in saying that people who have agreed to arbitrate, *e.g.*, in Karachi should litigate about the arbitration in Karachi. Under section 2 of the Act of 1899 a submission may come under the Act or under Schedule II of the Code according as a suit would lie, or would not lie, in a Presidency town. This depends on various accidental circumstances, *e.g.*, if one party out of many lives in the Presidency town, or if one part of the cause of action occurs in the Presidency town. We think that it should be open to parties to state in their submission clause that the reference is to be under the Act, and that all proceedings are to be taken, *e.g.*, in Karachi or in some particular Presidency town or commercial centre to which the Act applies. When an arbitration has been held or is being held under such a clause the law should require all questions to be determined by the court of the town whether the factum and validity of the submission be challenged or not. Such a rule is not more open to abuse than many others which work well in practice.

14. We think also that the practice of granting injunctions to restrain arbitration proceedings is one that might with advantage be totally prohibited. As we understand the law such injunctions should never be granted to a party whose case is that he never entered into an agreement to refer, but should be granted only in very special cases where there is an agreement to refer but the plaintiff claims

that it relates to a matter in respect of which there is some equity which makes it desirable to prevent proceedings being carried on. Such cases are extremely rare and there is no hardship, in our opinion, in refusing such injunctions in any case—still less in confining the right to grant such injunctions to the courts of Presidency towns, or other commercial centres.

15. We see no reason why a provision on the lines of paragraph 17 of the Second Schedule should not be made applicable to arbitrations under the Indian Arbitration Act; provided always that this provision is purely facultative, and is not in any way intended to require persons claiming arbitration to apply to the court in the first place to enforce the agreement to refer.

16. We are against the suggestion that the award should not be enforcible the moment it is filed. This we regard a very valuable improvement upon English practice and the only thing that has made arbitration in India in any degree effective. We have no evidence whatever of abuse of this provision and though it is open to be abused we see no grounds for repealing it.

17. We are also against the suggestion that the arbitrators should be compellable by the Court to state a case, as this would, in India, be sure to lead to wide and gross abuse.

18. In our judgment no amendment of the law will effect very much for the benefit of trade unless in those centres, to which the Indian Arbitration Act at present applies, there is provided a summary method for disposing of objections to awards, as well as a provision which will be effective to prevent the interference of any other court. We think that every court, acting under the Indian Arbitration Act, should be empowered to require all applications to set aside awards, on whatsoever grounds, to be made by motion on affidavit evidence; it being open to the court, if it thinks necessary (*e.g.*, in a case where allegations of fraud are made) to give facilities for oral evidence, and for discovery, and to require particulars from each party of his allegations. In an ordinary High Court, with an Original Side, there is nothing to prevent a Judge disposing of a motion under the Indian Arbitration Act as carefully and as thoroughly as though he were trying a suit, with the aid of discovery or oral evidence as necessary. To provide that an allegation of fraud will entitle the plaintiff to proceed by the more elaborate method of a suit is merely to invite plaintiffs to couple allegations of fraud with any other case that they may have.

19. We have ascertained that since the meeting of the Associated Chambers of Commerce in December 1923, the Government of India in the Legislative Department have made an investigation of the points of difficulty presented by the existing law. A few of the more important points on which the law requires to be amended, or defined, may be noted here. In a case arising in Cawnpore, or Amritsar, *i.e.*, a commercial centre to which the Indian Arbitration Act has been applied, but which has not got a Chartered High Court, it should be provided that an order confirming or setting aside an award is to be subject to one appeal, and one only. We

agree that the principle of Doleman *v.* Ossett Corporation (1912) 3, K. B. 257 should be reconsidered: the mere filing of a suit should not of itself interrupt an arbitration (*cf.* I. L. R. 3 Lah. 296 at 307). The effect of devolution of the rights of a party to a submission should be declared particularly as regards official assignees, or official receivers in insolvency. A period of limitation should be provided for motions to take an award off the file or to set aside the award on whatsoever grounds. Provision should be made enabling witnesses to be summoned before arbitrators and enabling commissions to be issued to examine witnesses for the purpose of an arbitration.*

II.

Arbitration in a Suit.

20. As regards arbitrations in suits, the chief question which requires attention is the question whether it is advisable to permit parties to a suit referring their dispute to arbitration otherwise than by the procedure provided by Articles 1—16 of the Second Schedule to the Code. Whether the language of the Second Schedule or of section 89 of the Code amounts to a prohibition of arbitration in suits otherwise than by the means described in the Schedule is a matter upon which judicial opinion is divided. The High Court of Bombay in Manilal Motilal *v.* Gokaldas Moolji, I. L. R. 45, Bombay, 245, has held that an arbitration in a suit, without any order as required by the Second Schedule, may be enforced as an adjustment of the suit under Order 23, rule 3. We consider that it would be advantageous if all arbitrations in suits, except as provided by the Second Schedule, were made void; the awards should only be recorded as adjustments of the suits when the court is asked to do so by all parties.

21. It sometimes happens that the matters in difference in a pending suit, together with other matters connected therewith, can most conveniently be disposed of by arbitration. Under the Second Schedule it would seem to be impossible to have any arbitration in a suit wherein the award should validly extend to other matters. We see no reason why other matters should not, by consent of all concerned, be included in such an arbitration, at all events by the leave of the court. We think, moreover, that this kind of objection, even when leave of the court has not been obtained, should be regarded as one to which the court need not give effect. In other words, we think that the court should have the power to grant the necessary leave *ex post facto*. Provisions will be necessary in such cases and is also necessary as regards adjust-

* We desire to make special acknowledgment, in this connection to Mr. B. C. Kennedy, I.C.S., Judicial Commissioner of Sind, whose note on arbitration is printed as an appendix to this chapter, and also to Mr. Rupchand Bilaram, Additional Judicial Commissioner, who took great trouble to give us particulars of cases in the Court of Karachi, and much valuable assistance otherwise.

ments which comprise matters not in suit, to make clear that the Registration and Stamp Acts are not defeated.

22. It would appear that an order setting aside an award under paragraph 15 of the Second Schedule to the Code may result in unlimited litigation notwithstanding the provisions of section 104, sub-section (*2*) of the Code. The summary given below of proceedings which arose out of an order of the munsif of Fatehpur in the Cawnpore judgeship is well worth study. We are told that the properties involved are two shops worth about four or five hundred rupees. The litigation as will be seen arose from the circumstances that an arbitrator who had been given time till 30th January 1918 filed his award on the 31st. The correctness of the order setting aside this award as made out of time was canvassed on appeal from the munsif's decree in the suit. The case has taken seven years and is now before the High Court of Allahabad. The case is not uninstructive as regards some of the points discussed in the chapters of this report which deal directly with appeals.

17th August 1917—Suit instituted (No. 438 of 1917.)

5th September 1917—Written statement filed by defendant.

13th December 1917—Case referred to arbitration.

15th January 1918—Order extending time for filing award: "The arbitrator should file his award before the 31st January 1918. Case to be brought forward on 31st January 1918."

31st January 1918—Award made and filed—decreeing the suit *in toto* in plaintiff's favour.

2nd February 1918—Defendant's objection that the award had been made beyond time by one day, and should be set aside.

1st March 1918—Munsif allowed objection, set aside award and fixed 22nd March 1918 for trial.

22nd March 1918—Trial, evidence recorded.

25th March 1918—Judgment delivered—plaintiff and defendant held joint owners in equal shares.

22nd April 1918 and 29th April 1918—Appeal and cross-appeal by both parties to the district judge at Cawnpore who transferred them to subordinate judge.

14th June 1918—Plaintiff's appeal allowed, defendant's appeal dismissed—on the ground that the award had been made within time and should not have been set aside. Decree passed in favour of the plaintiff in accordance with the award.

15th July 1918—Second appeals (Nos. 910 and 911 of 1918) in the High Court by the defendant against the two decrees of the lower appellate court.

4th January 1921—Both second appeals heard by a single Judge and dismissed.

30th March 1921—Letters Patent appeals (Nos. 21 and 22 of 1922) filed.

6th July 1922—Letters Patent appeals allowed—Order of the munsif setting aside the award restored, and the case remitted to the lower appellate court.

6th November 1922—Letter of the Registrar to the subordinate judge, Cawnpore, returning records of the case.

12th May 1923—Case heard by the subordinate judge on the merits, and judgment of the munsif affirmed—appeal and cross-appeal dismissed.

29th November 1923—Second appeal (No. 1591 of 1923) filed by the plaintiff. (Delay in filing the appeal was probably due to the intervention of the long vacation.)

3rd January 1924—Hearing under Order 41, rule 11, Civil Procedure Code; appeal admitted.

It would seem necessary to provide that an order setting aside an award and superseding an arbitration should not be impeached in an appeal from the decree.

23. An important question as to which we consider that the law might well be clearer is the question of the extent to which a court should be expected or required to interfere with the arbitrator's conduct of an arbitration between the date of the order of reference and the date limited for filing the award. Sometimes complaints are made to the court of the conduct of the arbitrator during this period. It seems to us that if long periods are not limited for the filing of the award it would be as well to prescribe that attacks upon the conduct of the arbitrator should not be entertained except upon the question whether the time should be further extended, or after the award has been made.

24. Some flagrant cases occur where there are two arbitrators each appointed by one side. Sometimes defendant's arbitrator will withdraw from the case just before the time comes to make the award and after many proceedings have been taken before himself and his colleague. Even if the court has power to appoint another arbitrator such tactics will in general produce extreme delay. Apart altogether from cases where the defendant's arbitrator is not playing fair, we have been given particulars of cases sent to arbitration under the Second Schedule where for one reason or another the delay has been unconscionable. After time has been given on one or two occasions the court is apt to grant further extensions of time rather than to have all the cost and expense already incurred before the arbitrators thrown away. Sometimes in the end the reference has to be superseded. Sometimes also the award has in the end to be set aside. In such cases the case has to commence *de novo* many months after it might have been heard originally by the court itself. No rules of law can be suggested by us to obviate entirely this type of disaster. All that can be done when such cases are noticed by a district judge or High Court judge at the time of inspection or in the course of a scrutiny of statements

of delay is to give such criticism and such advice as regards the handling of these cases as may tend to assist the judge to maintain a stricter control. The one weapon of any effectiveness which the court has is its power to limit the time for the making of the award.

25. Under paragraph 20 of Schedule II of the Civil Procedure Code where any matter has been referred to arbitration without the intervention of a court, and an award has been made thereon, any person interested in the award may apply to any court having jurisdiction over the subject matter of the award that the award be filed in court. The application shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. The court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause within a time specified why the award should not be filed. After such notice, according to paragraph 21, where the court is satisfied that the matter has been referred to arbitration and that an award has been made thereon *and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved*, the court *shall* order the award to be filed and shall proceed to pronounce judgment according to the award. Upon the judgment so pronounced the decree shall follow.

According to these provisions and to the decisions thereon, if there is any ground such as is mentioned in paragraph 14 or 15 is proved, the court has only one course open, namely, to dismiss the petition. It can either accept the award as it is or reject it altogether. If, however, the arbitration had been in a suit or under an order of reference on an agreement to refer them, under paragraph 14, the court could have remitted the award or the matter referred to arbitration to the reconsideration of the same arbitrator or umpire upon such terms as it might think fit. Moreover it is not clear that the court acting under paragraph 20 can modify or correct the award as it can do under paragraph 12 in the case of an award made in an arbitration through court. This is very hard on the parties in whose favour the award is: it discourages reference to arbitration, and leads to unnecessary litigation. It is now the accepted opinion, that arbitration should be encouraged as much as possible. It is therefore necessary that the court should have power even in the case of reference to arbitration without the intervention of the court, to exercise the powers given in paragraphs 12 and 14 of the Schedule. Both in the original Bill of 1901 and as it emerged from the Select Committee in 1903, it was provided that " for the purposes of section 526 (corresponding to paragraph 21) the court shall have all the powers conferred and shall perform all the duties imposed upon it by sections 518 to 522." Section 518 corresponds to the present paragraph 12 and 520 corresponds to the present paragraph 14. Probably this change was not carried out because the Special Committee which sat to consider the Bill in 1907 thought, as we have seen, that the whole law of arbitration should be transferred to a separate comprehensive Arbitration Act. It is, however, very desirable that the change

contemplated in the bill of 1901, should be made as early as possible. Most arbitrators are not professional lawyers and often make obvious mistakes of form which do not affect the merits of their decision.

26. There are a number of other amendments which might well be made to the Second Schedule in points of detail. These, however, cannot usefully be discussed here.

APPENDIX TO CHAPTER 14.

Note on Arbitration.

By Mr. B. C. Kennedy, Judicial Commissioner, Sindh.

1. Arbitration is very popular in Karachi and all the importing houses whether Indian or European use a form of indent which comprises a submission clause.

2. This system, as it exists, that is to say the application of the Indian Arbitration Act to mercantile cases, is a great boon and is not, I think, misused. There are however some difficulties.

3. No power is given to issue a commission under the Arbitration Act, though such a power exists in arbitrations under the Second Schedule, Civil Procedure Code. This is an inconvenient anomaly. It is nowhere clearly laid down what happens if a man having signed a reference dies before appointing an arbitrator.

If A enters into a contract containing a submission clause and then assigns his rights under the contract to B, or if he becomes insolvent and the estate vests in B as Liquidator, is B bound by the submission clause? This is not provided for and is nowhere laid down.

4. Moreover, though an award is to be executed as a decree, yet it is not actually a decree, and difficulties therefore sometimes arise. The Judicial Commissioner's Court has held that as an award is to be executed as a decree, it must be deemed to be a decree for all the purposes of Order 21. But it would be well if this were made clear by statute.

5. The rules of the Judicial Commissioner's Court have recently been amended so that the award is capable of execution immediately on filing as the Act presupposes. Before such alteration, the person dissatisfied with the award was able to delay matters by avoiding service of notice. Thus some months might elapse before the award holder was able to execute his award. Now he can immediately execute it and if the respondent 2 (as he may be called) wishes to raise any objection to the award he may do so, but that does not necessarily absolve him from the necessity of paying the awarded amount. Stay of execution is not generally granted except in special circumstances and on due security. It is to be noted that there seems nowhere any limitation prescribed for an application to take an award off the file and also that it is possible that a dishonest plaintiff might get a collusive award and file it and leave it dormant for years and then execute it. We have introduced rules as to notice but they do not possess the force of a statute and are merely for convenience. I think a short time should be given in which the respondent 2 should apply to have the award taken off the file, and a similar date in which respondent 1 should either take a step in execution or should give notice to respondent 2 of the existence of an award.

6. As things stand there are opportunities of delay. Applications are continually made for permission to revoke the submission. These are not regarded with much favour as the objections can be taken to the award after it is filed. Also there is a practice of filing declaratory and similar suits and suits to set aside the awards merely with a view to gain time. It sometimes happens that the cause of action may be in Karachi and also in some remote Punjab village. In such a case it is a common practice to proceed in the Punjab and stay or set aside the operations of arbitrators here. The Karachi Court has assumed to itself a widish jurisdiction, *vide* S. L. R. V., 97, but whether legally is now doubted in view of the case of Johnson *v.* Taylor Brothers in the House of Lords T. L. R. 1919, page 62.

7. It would be desirable to consider whether all objections whatsoever to the award and arbitration proceedings should not be taken in the Karachi Court, by way of motion to take the award off the file.

8. There are difficulties about appeal. In all the other places except Cawnpore where the Arbitration Act is in force there is a Chartered High Court, and in such a court there is an appeal under Letters Patent. We have no such clause in our Sind Courts Act. Thus an appeal if it be filed at all can only be filed under the Civil Procedure Code. But we, contrary to Allahabad, have held that no appeal lies in the case of an order under section 19 staying the suit. Similarly in contradistinction to the Allahabad High Court we have held that no appeal lies against the order of the Court under section 14.

9. The effect of certain recent Privy Council decisions has been to give arbitrators a very free hand and it is questionable whether this may not be abused. As things stand at present an arbitrator if he confines himself to awarding a certain sum from one party to the other without giving any reasons, cannot be in any way controlled by the court.

10. I should be inclined to give a limited right of appeal against the final order upholding or setting aside an award as also against an order staying or refusing to stay a suit and think also that it might be well to give the court some powers to control arbitrators. The exact manner in which this should be done would be a matter for further discussion. But there is little doubt that the Arbitration Act, excellent as it is in many ways, requires overhauling. There is for instance much doubt as to what happens (when as sometimes occurs) a suit and arbitration are going on simultaneously.

11. I am rather inclined to think that it might be useful if the aid of the court were occasionally invoked at an earlier stage. That is to say it is a question whether it might not be made optional for either party to a reference to apply to the court to frame issues. The arbitrator would then find on the issues and if the ultimate award was entirely contrary to the findings, then the award would be liable to be set aside. This of course was the pro-

cedure in antiquity and all writers are agreed as to its utility. I am rather inclined to think that persons who have acted for the parties as pleaders should be prohibited from acting as arbitrators. This is a common practice in Karachi, and has not, I understand, produced any evil results, but it must be very difficult to switch off from being an advocate to being a judge in the same cause, and if the award is objected to there may be difficulties which are obvious enough.

12. As regards the extension of the Act elsewhere it would be inexpedient, unless very much wider powers are given to the courts to control arbitrators and proceedings before them. I imagine that it would soon be the case that no money-lender would ever make a loan unless the debtor signed a reference and it is not always that the court is strong enough to act as the Bombay High Court did in the case of Velchand Chhaganlal *v.* Lieut. Liston, I. L. R. 38 Bom. 638.

13. As regards Schedule 2 of the Civil Procedure Code it badly needs recasting. There also is a difficulty as to what happens if an arbitration and a suit are going on simultaneously. It has been held that the award must be treated as valid compromise but the whole question needs further consideration. In my opinion one Code should be produced covering both urban and muffussil arbitrations.

CHAPTER 14.

Insolvency.

I. Provincial.

1. The English law of bankruptcy is of some antiquity and has passed through many phases. The broad principles of modern bankruptcy administration in England may be dated from Mr. Chamberlain's Bankruptcy Act of 1883. It is difficult to state the general idea without entangling the exposition with qualifications and exceptions. In its simplest form, however, the general idea is that if a person cannot pay his debts as they become due his creditor should have the right to insist on all the debtor's assets being impounded and applied towards the payment of all his debts in a due course of administration. An obvious and necessary condition is that if all a man's property be taken from him and made to vest in a receiver or trustee for the benefit of his creditors, it is hardly reasonable to make him liable to imprisonment for debt as a form of execution. Indeed all ordinary debts must, if there is to be a liquidation at all, be regarded as claims upon the fund, or insolvent's estate, and not any longer claims against the individual. The debtor having given up all he has must be allowed to earn his own living if he can, and must, in general, be free to make a new start in life. Just as this liquidation of the debtor's assets can be enforced by a creditor, so too it must in general be allowed on the prayer of the debtor himself; otherwise it might well happen that different creditors pursuing each his own remedies on his own behalf might waste the debtor's assets, bring his business to the ground, or increase the load of debt by unnecessary costs of law suits. It is generally considered also that the right to present a petition in insolvency must be allowed to a debtor because of the liability to imprisonment for debt, whether under the old "*ca sa*" principle which in effect obtains still in India or under the judgment summons principle introduced into England by the Debtor's Act of 1869.

2. Obvious dangers attend the practice of allowing a complete release from all ordinary debts upon a mere condition that the debtor hands over his assets, whatever they may be. An Insolvency Act is apt to become a "debt-paying-made-easy" contrivance. From the time of Elizabeth till comparatively late in the nineteenth century the principles and practice of the matter were painfully evolved not without a large number of legislative and administrative experiments. In England it is true, one still hears of fraudulent bankruptcy as being a paying game, but in fact it is a highly dangerous one and is but seldom played with any great success. Particular cases in which bankrupts have to all appearance been somewhat cleverer than their trustees, or in which members of the bankrupt's family succeed in claims which reek of suspicion are certainly to be met with. But broadly speaking

bankruptcy in England is very well administered, especially in the High Court in London, and the bankruptcy court is a real terror to evildoers.

3. In India insolvency law is very little understood. This is true not only of the public but of many of the courts which have to take part in its administration. The jurisdiction is a very special kind of jurisdiction and the principles underlying it are not seldom completely bewildering even to people who are by no means badly versed in divers other branches of the law. The reason of this is that modern liquidation principles are quite new in India. As regards the Presidency Towns and Rangoon the law of insolvency before 1909 was the Indian Insolvent Act (11 & 12 Vic. c. 21), *i.e.*, an Imperial statute of 1848, representing a very early phase of bankruptcy administration. As regards the rest of India the law of insolvency prior to 1907 was represented by certain provisions in the Code of Civil Procedure, 1882, which dated from 1859 with some revision in 1877.

4. The provisions of the old Code were introduced to enable honest judgment debtors who were imprisoned for debt, or threatened with such imprisonment, to retain their liberty on giving up all their property. The court had to examine the debtor and hear the decree-holder and other persons and their evidence, and might only declare the debtor to be an insolvent if satisfied that he had not fraudulently concealed or transferred property, recklessly contracted debts, or given an unfair preference to any creditor, and so on. If, however, the court thought it proved that the debtor had been guilty of any fraudulent concealment or transfer of property, or had made false statements in his application or had been guilty of any bad faith in the matter, the court had power to give the debtor a year's imprisonment then and there instead of declaring him insolvent. If a declaration of insolvency was made, the court might either discharge the debtor then and there or it might appoint a receiver. When the receiver certified that the insolvent had placed him in possession of the insolvent's property, or done everything in his power for that purpose, then the court might discharge the insolvent on such condition as it might think fit. The discharge did not affect the insolvent's liability for any unscheduled debts and even as to scheduled debts did not end all liability unless and until one-third had been paid or twelve years had elapsed from the date of the order of discharge.

5. Whatever the demerits of this rough and ready system, it would not appear to have unduly favoured debtors or to have made insolvency a method of defying creditors. Indeed in some respects it was unduly hard on the honest debtor. It was defective too in that pending the actual order vesting the insolvent's property in the receiver there was no interim protection given to the insolvent's estate Accordingly, by the Act of 1907 an endeavour was made to put in force in India a simplified form of the English bankruptcy law. The result of this endeavour may be seen from the Statement of Objects and Reasons of the bill which ultimately became Act V of 1920, the present law. "The chief indictment of the Act

(*i.e.*, of 1907) is that it lends itself to the protection of fraudulent debtors, that it subjects an undischarged insolvent to little or no practical inconvenience, and that its provisions for the punishment of fraudulent insolvents are not effective in practice."

6. It is a little early to say dogmatically whether the Act of 1920 has been or is likely to be successful in any great degree in respect of any of these matters. Its general tendency was to bring the Provincial Act closer still to the Presidency Towns Act of 1909 and to English practice. The main changes introduced by it were:—

(1) provisions to compel a debtor to apply for his discharge;
(2) provisions enabling the court to withhold or cancel protection orders;
(3) provisions to facilitate the prosecution of fraudulent debtors.

In all the provinces of India we have had from the witnesses loud complaint of the practical effect of the law of insolvency as operating to defeat and delay creditors and to enable judgment debtors to snap their fingers at decrees. There is a very wide opinion to the effect that the English bankruptcy practice is unsuited to mofussil India and that the introduction, more and more, of English principles has been a mistake. It is generally conceded on the other hand that these principles are but little understood, that the machinery for administration of insolvent estates has not so far been effectively provided, and that creditors are apt to give up all hope and take no further interest the moment their debtor is adjudicated.

7. We might usefully set out here a passage from the valuable memorandum of Mr. H. F. Dunkley, I.C.S.:—

> "District judges in Burma, I regret to say, appear to take but little pains over their insolvency cases and show a surprisingly scanty knowledge of insolvency law. Recently I saw a case where a debtor, having gone bankrupt, showed debts amounting to over Rs. 60,000, and his assets, when realised, came to a sum of about Rs. 9,000. Out of some twenty creditors only three appeared and proved their debts, amounting to about Rs. 5,000. Out of the assets the district judge paid the claims of these three creditors in full, and then, without issuing the notices required by section 64 of the Provincial Insolvency Act to the remaining creditors, handed over the balance of the assets to the insolvent, and discharged him. This was, of course, an extreme case; but almost equally bad cases occur with frequency."

8. It may be useful to ask what are the features of English Bankruptcy practice which prevent the fraudulent debtor from resorting to it as a sure and easy means of defeating his creditors and to consider how far the same conditions operate, or may be

made to operate in India. The chief features we take to be these:—

(1) A debtor is made to give up all his assets.

(2) Everything coming to him before his discharge whether in possession, reversion or remainder, goes to his trustee for the benefit of his creditors.

(3) He is treated as a person who for some time before his adjudication was really in possession, not of his own property but of his creditors' property. Accordingly some of his previous transactions are ripped up as being fraudulent preferences or otherwise fraudulent transfers. Also voluntary settlements are set aside. *Primâ facie* all his transactions since the act of bankruptcy are invalid, though there is protection for those who take without notice and for value.

(4) Bankruptcy of itself amounts to "*Capitis diminutio*," and involves a certain measure of disgrace.

(5) The bankrupt has to make a complete disclosure of his affairs according to a highly elaborate set of schedules which include a deficiency account.

(6) He has to attend on the official receiver and/or the trustee appointed for him by his creditors, give assistance and information.

(7) He is exposed to a public examination conducted before the court. The official receiver represents the public; any creditor can take part. The trustee in bankruptcy can and usually does take part.

(8) The bankrupt, his relatives, and any one who can give information may be examined before the court in private under the inquisitorial provisions of the private examination section.

(9) Until he obtains his discharge he commits a criminal offence if he obtains credit over £20 from any one person without revealing that he is undischarged.

(10) A whole series of acts are made criminal offences if committed by a bankrupt, and with respect to them the onus is put upon the bankrupt to show that there was no intention to defraud, *e.g.*, failure to deliver up or disclose property or documents, material omissions in any statement, failure to inform of false debt, etc., etc.

(11) When the bankrupt comes to apply for his discharge he finds that it is granted, suspended or refused according as he has or has not committed certain bankruptcy offences.

(12) There are provisions whereby a certain portion of the earnings of a bankrupt even after his adjudication can be earmarked for his creditors.

9. Under the Presidency Towns Insolvency Act, 1909, an insolvent is liable in substance to all these disabilities, risks or burdens.

Since 1920 the same principles apply, with very few exceptions, to the Provincial insolvent. Certain differences there are under the Provincial Act, *e.g.*, the title of the receiver does not relate back to the act of insolvency, but only to the presentation of the petition; persons other than the insolvent cannot be examined before the court in private. In neither Act are the criminal offences special to the insolvency law, defined quite so elaborately as in England. There are other differences between the Indian and English law, but so far as the main features, above referred to, are concerned the differences are in no wise fundamental, and the policy of the law is to give a complete system on the analogy of the law in England. Yet though the law would seem to be practically the same, in practice the difference is enormous. The circumstances in India make it much more different to administer the law; administration both in method and in personnel is much feebler.

While in England there is always the receiver, an official of the Board of Trade, to represent the public and administer estates where necessary and in other cases the trustee in bankruptcy appointed by the creditors to wind up the estate, in India no receiver need be appointed until after adjudication and he usually has no official position but is merely an officer of court who receives little or no help, in funds or otherwise, from the creditors.

In introducing the Bill which became the Act of 1920, the Hon'ble Sir George Lowndes is reported to have said:—

> "In this connection, I ought also to refer to the question of the official receiver. No doubt, for the efficient administration of any insolvency, a competent official receiver is necessary and if we could provide official receivers throughout India for all the mofussil insolvency courts, we should be very glad to do so. But as Hon'ble Members are aware, official receivers have to look to fees for their remuneration, or at all events Government should have to consider the question of fees in fixing their remunerations, and the fees in most district courts in insolvency matters would be very small. Therefore, though we recognise that it will be very desirable to have official receivers, if we could, throughout India, the cost would practically make it impossible, and we do not look forward at present to any great extension of the system of appointing official receivers."

We set out later in this chapter the steps that have so far been taken in this connection and make our recommendations, but we would only add here that a system of law requiring a considerable amount of administrative machinery cannot be expected to develop on satisfactory lines, unless such machinery is supplied.

10. In India it is much more difficult than in England to ascertain what the debtor's property is or has been. A host of the debtors seem to have no assets whatsoever. They come into court under pressure of imprisonment for debt, declare themselves to be

possessed of no assets save their clothes and a lota, produce a lota in confirmation of their statement, and request (successfully in many cases) to be white-washed. In an enormous number of cases accordingly there is no need to appoint a receiver, and no receiver is appointed because there is nothing to receive. Again, it is much more difficult in India to trace transactions in the absence of books of account, or at least of reliable books of account. In view of the joint family system and the prevalence of benami transactions the task of tracing assets involves more trouble, more difficulty and more outlay. Just as many concerns become insolvent by reason of the difficulty and expense of collecting outstanding debts by means of the law courts so, though the legal machinery is complete (since 1920) for the purpose of ripping up past transactions if fraudulent, the trouble, expense, and delay of putting it in motion are prohibitive. The risk of abuse and other reasons having prevented the Legislature from establishing in the provinces any inquisitorial procedure as regards third persons, a receiver acting for the benefit of creditors has to take much greater risk than a trustee in bankruptcy would have to do before launching a bankruptcy motion in an English Court. Again, the Legislature has hedged round with special safeguards the methods of prosecution for insolvency offences. These make conviction very difficult to secure, especially as in an Indian court the seriousness of an insolvency offence is almost certain to be lightly estimated. Indeed there is but slender chance before the tribunals in India of a debtor receiving a really heavy sentence for a mere insolvency offence, *e.g.*, for a fraudulent omission in his statement of affairs. There appears to be no particular feeling of disgrace as regards an appearance in the insolvency court; the liability to be publicly examined and the loss of franchise, it appears, matter rather less than nothing. A man who cannot trade where he is known because he is undischarged can readily move elsewhere in India and carry on in safety. Beyond all this is the circumstance that the moment the matter goes into the insolvency court the creditors give up hope and refuse to throw good money after bad.

11. We are not of opinion in these circumstances that much can be done by proceeding to insert further amendments into the Act of 1920 on the footing that the full principles of bankruptcy law are to be applied in the mofussil. The Act of 1920 is on the whole well considered in details. One or two points, however, require to be further examined.

12. As regards the mass of debtors who claim the benefit of insolvency at a time when they have little or nothing in the way of assets, it is to be remembered that such persons in England would probably not be forced into the Bankruptcy court at all. In the absence of evidence of means the County Court judge would, in many cases, have declined to issue a judgment summons; the debtor would not, therefore, have been compelled to file his own petition, and the creditor would have regarded bankruptcy as

clearly not worth his while. The law of imprisonment for debt appears to require that large numbers of debtors, with little or no property, should be put through the insolvency court. The trouble is that a summary decision as to whether the debtor's assets are likely to exceed, say, Rs. 500 is taken at a time when there has been very little scope for real investigation. Summary administration under section 74 is very necessary in a great number of cases. The danger is that cases in which real and protracted investigation is required are apt by means of this summary procedure to escape investigation.

13. In the same way under the Provincial Act the public examination of the debtor is really held at the time of hearing the petition for adjudication. Even although an interim receiver may have been appointed, this stage of the proceedings is in general much too early for any really effective public examination into the debtor's conduct and affairs.

14. A feature of the 1920 Act, as of the Act of 1909, is that neither the presentation of the petition, nor even an order of adjudication necessarily results in the debtor being protected from arrest and detention in jail in execution of a decree. The court now has unfettered discretion to grant or withhold protection, to renew or revoke its orders for protection, to make general orders, or orders limited to the case of particular decrees or creditors. If the debtor is in jail at the time of the presentation of the petition, he does not necessarily get his release. If he is not in jail, the court, in view of the provisions of section 55, sub-section 4 of the Code of Civil Procedure, and of the Act of 1920, can consent or refuse to imprison him, even if he presents his petition, *primâ facie* gives up all his assets, and proceeds to carry out the duties of an insolvent. Now, if a man has given up all his property and submitted himself to the insolvency law it is difficult to keep him in prison, even if a creditor is willing to pay his diet money, on the mere principle of "*capias ad satisficiendum.*" But whether this privilege on the part of the creditor to keep in jail an adjudicated insolvent is, or is not, a very admirable device, or logically defensible, it was one of the main amendments introduced into the law in 1920, for the purpose of preventing debtors, whose petition for adjudication could not be refused, from defying execution creditors. In this respect, no doubt, the new principle of giving complete discretion to the court promises to work better. It remains, however, to be seen upon what principles this judicial discretion to grant or refuse protection will be applied in the mofussil. It is certainly anomalous that a man may be adjudicated an insolvent and comply with all requirements of the insolvency law, be convicted of no criminal offence in connection with insolvency, and yet be liable to go to prison for an indefinite number of times at the discretion of the insolvency court. As, however, the great need is to protect creditors and to prevent debtors from abusing the insolvency law in their own interests, we are not disposed, at present, to recommend any change in the recent Act.

15. It has been pressed upon us that the private examination section, *viz.*, section 36 of the Presidency Towns Insolvency Act, should be made applicable to the mofussil, not that there is not already ample power under the Provincial Act to examine the debtor, but in order that a receiver may be able to examine a third party and thus to obtain, in a comparatively inexpensive manner, reliable information as to the debtor's conduct and affairs. The ordinary course in England and in Presidency towns is for the receiver to obtain, under the section, evidence as to the dealings between the insolvent and the third party. He would, as a rule, be careful to utilize his powers under the section before launching a motion to set aside a fraudulent preference or to recover property. In the like manner he would use the section, if necessary, to enable him to deal with doubtful proofs of debt. In the absence of such powers it is only to be expected that the setting aside of past transactions, under special principles of insolvency law, will be regarded whether by creditor or by receiver as a hazardous expenditure of time and money.

Sub-section 4 of section 36 of the Presidency Towns Act gives the court power, if on the examination of any person the court is satisfied that he is indebted to the insolvent, to order him to pay; in like manner if the court is satisfied that a person examined has in his possession any property belonging to the insolvent, the court may order him to deliver it up. The wording of the section is slightly different from that of section 27 of the Bankruptcy Act of 1883, which gives these powers to the court only where the person examined admits that he is indebted to the debtor or that he has in his possession property belonging to the debtor. The change in wording would seem to avoid the necessity of actual admission, and to enable the court to act where on the answers of the person examined it is quite clear that he owes the money or has the property in his possession although he refuses a complete admission in set terms. Some of the witnesses before us have, we think, mistaken the limit of the power intended to be conferred by the section. In any case we are not satisfied that for the purpose of the mofussil these particular powers could safely be, or need be, entrusted to the courts. It would be quite enough that the receiver should afterwards bring a motion before the court using the evidence taken under section 36 against the third person.

The power of examining the third person, however, is very valuable. It is discretionary on the part of the court to grant the application for examination and it is discretionary in the court to allow, or to disallow, any particular questions. The court can close the examination whenever it likes. The real trouble in the mofussil in such cases is that there is no officer apart from the judge himself, *e.g.*, munsif or subordinate judge or district judge, before whom such examination can be conducted. The official receiver is not a proper person to do so. Any considerable use of the powers of the section might hopelessly interrupt the ordinary business either of the district court or some court subordinate to it.

If the system of having a registrar at a headquarters station is brought into force, we think that the holding of such examinations, at any rate in special cases, might be made part of the duties of such a registrar. We suggest that when the insolvency law is next amended powers analogous to those of section 36 of the Presidency Towns Insolvency Act might be given, subject to the option of the local Government to bring them into force for particular courts.

16. As regards the criminal offences created by the Act of 1920, these are in substance the same as those created by the Presidency Act of 1909. In practice the procedure whereby the insolvency judge takes upon himself the duties of a magistrate, trying a warrant case, has in the past been highly unsatisfactory. The prosecution is in the hands of the official assignee or of the creditor. It has been laid down that the charge as ultimately framed must correspond with the notice originally issued to the insolvent by the court. By the Act of 1920, however, section 70, sub-section 5, the insolvency court instead of proceeding itself to try the case, as a warrant case tried by a magistrate, may make a complaint to the nearest first class magistrate, who may deal with the complaint in the ordinary course of criminal justice. Powers similar to these should be introduced into the Presidency Towns Insolvency Act by an amendment of section 104. We think, moreover, that the necessity for notice to the insolvent might well be discarded altogether, and that the procedure in such cases might be further assimilated to the procedure in England whereby an order for prosecution should be obtained from the bankruptcy court, without consulting the bankrupt on the subject; the bankrupt having plenty of time and opportunity to say what he has to say when he is arraigned before the criminal court. The simplest form of arrangement would seem to be that the receiver or, if he refuses, a creditor should be given power to apply to the court *ex parte* for an order of prosecution and that thereupon prosecution should be commenced and carried on by the Local Government through such officer as it may appoint for the purpose. In England it is the duty of the Director of Public Prosecutions to institute and carry on the prosecution; he can abandon it if he thinks on investigation that the case cannot be proved; the insolvent is only concerned with the proceedings as any ordinary accused is concerned with criminal proceedings against him—namely to defend them when they have been instituted.

17. A chief feature of the 1920 Act was a provision that the time should be limited by the court in every case within which the insolvent must apply for his discharge. The intention of the Legislature was to ensure that the conduct of the insolvent should be in all cases brought under the scrutiny of the court. The penalty for not applying for discharge is that the insolvent is liable to have his adjudication annulled with the result that he would not get back any property distributed among his creditors, but on the other hand would necessarily be liable to imprisonment and any other form of execution for debt at the instance of judgment creditors.

The following table gives the number of insolvents adjudicated in each province during 1922 with the number discharged or whose insolvency has been annulled (so far as available):—

Province.	No. of persons adjudicated insolvent.	Discharged or died.	Annulled.
Bengal.	664	195	149
Assam	48	14	8
Bihar and Orissa . . .	126	68	121
Madras	1,479	56	Not given.
Bombay	314	56	,,
Sind—			
(i) District Courts . .	34	9	,,
(ii) Judicial Commissioner's Court.	75	19	,,
Agra	510	112	,,
Oudh	82	9	,,
Punjab	285	287	47
Burma.	404	84	Not given.
Central Provinces . . .	1,085	126	,,
North-West Frontier Province	49	4	,,
Coorg	6	..	,,

It will be seen that except in the Punjab the number discharged bears only a small proportion to the number newly adjudicated during the year. The figures showing the number of undischarged insolvents in each province under the 1920 Act are not available, but it appears from the returns that at the end of 1922 there were 7,436 undischarged bankrupts in Bengal, 780 in Assam, 998 in Bihar and Orissa and 4,668 in the Punjab. These figures, however, apparently include persons adjudicated insolvent under the previous Acts who were not compelled to apply for discharge. It would be very useful if in future years the figures would be given separately with regard to the Act of 1920.

We incline to think that the time within which application for discharge should be made is either being extended with undue frequency or that this matter is being ignored by receivers and by courts. Possibly, too, there is some misunderstanding by reason of which creditors, who have compromised with the insolvent, are being allowed some say in the matter. It cannot be too strongly emphasised that unless an insolvency is in due form annulled the

insolvent should in every case be proceeded against unless he applies for his discharge within the time limited. It may be that receivers postpone or agree to the postponement of the date for application for discharge, because the discharge when granted terminates the time during which any property accruing to the insolvent enures for the benefit of his creditors. In such cases however the proper course, as a rule, is not to postpone the application for discharge, but to make the application; the court being able to suspend the discharge for such period as is proper. We think that the importance of insisting on the provisions of section 43 of the Act of 1920 might in all provinces be emphasised by circular orders of the High Courts as any failure in this respect will do much to render nugatory the administration of insolvency.

18. If a debtor presents his own petition he has, by section 30 of the Act, as part of his petition to give a statement of his affairs. When a creditor presents a petition there is much difficulty in getting a schedule or statement of affairs from the debtor within a reasonable time. This is a main cause of bad administration. By section 22 the debtor on the making of an order admitting a petition is required to produce books of accounts and to give an inventory of his property and lists of his creditors and debtors if required to do so by the court or the receiver. Failure to comply with section 22 renders the debtor punishable on conviction by the court with imprisonment which may extend to one year. It seems plain that no insolvent failing in this duty could be regarded as having any right to protection against arrest and execution. The interval between the order admitting the petition and the hearing should not, especially in the case of a creditor's petition, be too long.

19. There is not in the Act of 1920 any provision corresponding to the provisions of the Presidency Towns Act for a committee of inspection in sections 88 and 89. So little use is made of these sections in Presidency towns that one hesitates to recommend their introduction into the mofussil. In principle, however, it seems hopeless to expect good administration of a fund which really belongs to the creditors unless the creditors are given a means whereby they may have a proper voice in superintending the administration. Under the Presidency Towns Act a committee of inspection does not come into existence unless the court thinks fit to authorise the creditors, who have proved, to appoint one. We should very much like to see a commencement made in this respect, at all events in some of the larger towns which come under the Provincial Act.

20. A judgment creditor in India regards insolvency as defeating him because it puts a creditor, who has not obtained a judgment, on the same footing as himself. He is very apt, therefore, to try to make special terms for his own benefit in preference to prosecuting the insolvency proceedings which are necessarily maintained for the benefit of all creditors. In like manner, there seems to be much confusion of mind as regards the proper step to be taken when a defendant is adjudicated insolvent during the pendency of the suit.

In any case in which the suit is merely one to establish a claim which in insolvency would be a provable debt or liability, the correct course clearly is to stay the suit in order that the plaintiff's claim may be proved in the insolvency and to give leave to prove for the costs incurred in the suit. It is much better that it should be proved in the insolvency than that a law suit should go on either against the insolvent who has no interest or his receiver. The only cases in which suits should be allowed to go on against the insolvent or his receiver are cases in which the insolvent has an interest of his own, or cases in which the plaintiff is insisting upon a right which is not a mere claim to a provable debt, *e.g.*, where the plaintiff is a mortgagee insisting upon his security. Section 29 of the Act of 1920 is new. In our experience many courts are much in need of instruction as to the principles upon which that section is to be applied.

21. The provisions with regard to the proofs of debt under the Act of 1920 may be satisfactory for many of the cases which arise in the mofussil. It is quite clear to us, however, that in any insolvency where claims are numerous and disputable, as for example in commercial insolvencies such as may readily arise in towns like Karachi or Cawnpore, the provisions as to the court settling the schedule of debts, with or without the aid of the receiver, are completely inadequate. The only practicable method of dealing with proofs of debt in complicated or difficult cases is for the trustee or receiver to regard himself primarily as a business man in charge of an estate, not as a tribunal deciding a large number of complicated suits. When proofs are lodged he should within a limited time admit them or reject them or call for further items of proof; creditors, if not satisfied, can move the court on motion. Under the Act of 1920, section 33, the arrangement is that the creditor should tender a proof and that the court should, by order, frame a schedule of creditors and the amount of their debts. For this purpose, no doubt, where there is an official receiver, and directions have been given under section 80(*b*), the official receiver may be utilised for the assistance of the court; but an ordinary receiver cannot be. The provision, however, of sub-section 3 is that any creditor may apply for an order directing his name to be entered in the schedule, and that the court, after causing notice to be served on the insolvent and other creditors who have proved their debts, and hearing their objections, if any, shall comply with or reject the application. This seems to involve that under this Act the insolvent is a person who is to be heard upon the admission of any proof of debt. The notion that an insolvent is to be considered as a person entitled to litigate with proving creditors about the amount of their debts is unfortunate. A main principle of bankruptcy in England is that the insolvent goes out of the picture for such purposes altogether; all his property is vested in the receiver; the receiver stands in his shoes; the other creditors, not the insolvent, are interested in the distribution of an insufficient fund.

22. The inadequacy of the provisions of the 1920 Act as regards proof of debts was brought to our notice very

forcibly in Karachi. Of late years, in Karachi, insolvencies on the part of commercial firms have occurred in which there have been presented numerous claims—claims for very large amounts requiring for their adjustment considerable legal capacity and knowledge of commercial law and business. The 1920 Act has applied to Karachi since October 1920. The official receiver, as we were informed, holds enquiries into proofs of debt on the analogy of the proceedings in a suit under the Code. Written statements are filed, the insolvent or his pleader is allowed to take part, also other creditors and their pleaders. No rules have been framed by the Judicial Commissioner's Court under the Act. There are no provisions for proofs being admitted or rejected within a given time. The result appears to be that unless the whole procedure is radically altered, important claims in which English firms, Punjab firms and Karachi firms have different interests have no chance, whatever, of being settled within ten times the reasonable time.

In the case of Karachi we desire to make a very strong recommendation that the Presidency Towns Insolvency Act, should be applied with as little delay as may be possible. In 1922 the number of cases was 75, in all of which the official receiver was engaged. We consider the Act of 1920 to be quite unsuitable to the conditions of a mercantile seaport. Apart altogether from any unnecessary misunderstandings of the procedure under the Act of 1920 we think that the best rules which could be framed by any High Court to carry out the intention of the Legislature would necessarily fall short of providing a workable scheme for the purpose of dealing with a complicated commercial insolvency. It is true, in a sense, that a receiver or trustee in bankruptcy admitting or rejecting a proof is acting in a *quasi*-judicial manner. But the whole object of insolvency administration is that proofs of debt may be admitted when the receiver is satisfied and that unfounded litigation may thereby be avoided. When it cannot be avoided it should take place directly before the court on a motion to expunge the proof or to admit the proof. In no ordinary circumstances should the insolvent, still less his pleader, be allowed any say in the matter save that the insolvent is obliged to give due information to the receiver or trustee. We consider that the accommodation provided for the official receiver in Karachi is insufficient. This branch of legal administration in Karachi should be made the subject of a special effort at radical reform. So far as we can see there are estates which after the expiry of a long time do not get appreciably nearer to being liquidated.

23. In certain parts of India land tenures, and the desirability of protecting the agriculturist operate in a special way to create difficulties as regards insolvency administration. When holdings are non-transferable, insolvency law is apt to be a means whereby agriculturists can evade the payment of just debts notwithstanding their ability to pay. There is, for example, a sharp contrast between Berar and the Central Provinces proper. In Berar the land revenue system is a form of ryotwari system under which the

cultivators hold land direct from Government and pay land revenue. Their holdings are transferable and heritable and are for all practical purposes full estates in landed property. In the Central Provinces proper most of the cultivated land is held by occupancy tenants, whose rights though heritable are not transferable. By the Central Provinces Tenancy Act (I of 1920), section 12, sub-section (2), the Legislature has invalidated any transfer of holdings and forbidden the appointment of a receiver under section 51 of the Code and declared that the rights of an occupancy tenant shall not vest in the court, or in any receiver, under the Provincial Insolvency Act, 1907. An occupancy tenant who receives a loan of money gets the loan on the security of the succession of his crops. He can, however, apply to the insolvency court, get adjudicated, keep possession of his holding, and avoid payment altogether unless the court can seize his crops. A man holding fifty or sixty acres may declare his assets to be a few cooking vessels worth about five rupees. We have no reason to suppose that the policy which prevents an occupancy tenant's holding from being transferable is likely to be reversed. Under the Act of 1920 an occupancy tenant might, in such circumstances as we have described, be allowed to go to jail at the instance of any judgment creditor. Similar difficulties arise in the case of lands being under the Punjab Land Alienation Act, 1900, and of occupancy holdings in Bengal and Bihar under the Bengal Tenancy Act, 1885. We think, however, that the insolvency law requires special adaptation to circumstances of the kind above described: this has never been attempted.

24. The main difficulty with respect to provincial insolvency is, however, the difficulty of getting suitable persons to act as receivers. By section 57 of the Act of 1920 (reproducing section 19 of the Act of 1907), the Local Government may appoint persons to be official receivers. When this is done the Government is to be credited with the commissions fixed under section 56, and the official receiver is to be paid out of the funds so created, and receive no other remuneration for winding up the estates. When such official receivers are appointed the High Court has power under section 80 to make rules giving them the powers to hear petitions, examine the debtor, make adjudication orders, frame the schedule of debts, grant discharges, determine unopposed applications and other small matters. Where there is no official receiver the court may at the time of adjudication, or afterwards, appoint a proper person on giving security to be a receiver. It may also, under section 20, in cases of urgency, appoint an *ad interim* receiver at the time of the admission of the petition. Little use has hitherto been made of the power of Local Governments to appoint official receivers.

We feel bound to express the opinion that the person who is likely to become trustee of the debtors estate is not a suitable person to exercise such powers as are mentioned in clauses (*a*), (*c*) *or* (*d*) of section 80. In his capacity as receiver he has interests adverse to the debtor and should not be allowed to preside over the debtor's examination; still less does it seem proper in a contested case that

he should decide as to acts of insolvency. Section 80 seems to us to introduce much confusion into insolvency practice. In Madras trouble has been caused by the discovery after much time had elapsed that the official receiver had never been appointed receiver of the estate by any order of the court.

In about nine districts in Madras pleaders were appointed official receivers on a salary of Rs. 50 a month and were paid a certain amount for a clerk and postage. In Sind there is an official receiver of the Karachi Judicial Commissioner's Court at Rs. 500 a month, to whose work reference is made elsewhere in this chapter. In the United Provinces there are nine at stations where insolvency proceedings are more numerous, their remuneration being five per cent. of assets coming into their hands, subject to a minimum of five rupees in each case. In Berar there are two, who appear to do fairly well, and in addition to their insolvency work get other receiverships. We received, however, several complaints that the work in Madras by these receivers was unsatisfactory, the pleaders in question being practising lawyers who had more interest in their own cases than in pressing forward their insolvency work. It appears that recently the Local Government has ordered that they shall no longer receive a fixed pay, but be paid by commission. In other provinces and districts, the ordinary custom is that where a receiver is appointed at all (it being unnecessary in a large number of cases where the estate is summarily wound up—the estate not being worth five hundred rupees) local pleaders from the Bar are appointed. Particular judges, no doubt, make a practice of giving all such receiverships to the same pleader in order that the less remunerative and the more remunerative work may go to the same man, and that he may have some experience of the work. We recognise that in a large number of districts there can never be enough work to require as official receiver a whole time officer of Government. But in certain districts, or groups of districts, it might be possible to appoint a person who should really be an official, who would be able not only to take receiverships in insolvency, but also be appointed to other receiverships which may arise in ordinary suits, and possibly take over guardianship cases, or appear as guardian *ad litem* for minor defendants in suits. The system employed in Madras of appointing as an official receiver a local pleader who continues his practice does not appear to us to be desirable. He would naturally attend to his private practice and frequently would not be available to carry out the business of his receiverships. There would seem to be special danger under the Madras system of profits being made by receivers beyond their legitimate commission. We appreciate that accounts are examined periodically by the Accountant General's Department. We consider that where it is possible to have an official receiver, he should be a whole time officer, and we suggest that he should be selected as munsifs are selected, and, if possible, included in the munsifs cadre, with a chance of promotion to judicial office.

25. It is also for consideration whether, if such official receivers are appointed, as they would be by the Local Government under the

Act, they should not be supervised by Government in the same way as the Board of Trade supervises the work of the official receivers in England. As to the work of receivers generally we would only remark that possibly much of the unsatisfactory work that has taken place in the administration of estates is due to the inexperience, not only of the court and pleaders generally, but especially of those who have been appointed to be receivers. We have come across in several provinces more than one instance where the ordinary method of the receiver in dealing with assets is to put up the book debts due to the insolvent and decrees he has obtained to auction, with the result that they are bought by speculators at a low figure, the purchaser taking the risk of realising what he can by suits or otherwise. This is hardly what the Act contemplates as an ordinary method of administration: it is not administration at all. Doubtless this course may be necessary in some instances but it should be regarded as a last resort.

26. Finally we would advert to the difficulty there is in applying ordinary English principles to the case of an insolvent who is the father or *Karta* of a joint Mitakshara family. Some decisions would appear to make the whole family property vest in the receiver. This again is a matter which has given rise to special difficulty in Madras. It is no easy matter to lay down rules as to so thorny a subject but an attempt should be made to elicit opinion and to give some better guidance to the courts.

II. Presidency Towns.

27. The Presidency-Towns Insolvency Act (III of 1909) applies to Calcutta, Madras, Bombay and Rangoon. In the previous part of this chapter, we have dealt with the desirability of extending the Act to the town of Karachi. The post of official assignee in all Presidency-Towns is a separate office, but in Rangoon it is combined with several other offices including that of public trustee and official receiver. At one time we understand that the same individual used to act in Bombay as official assignee and official receiver, but this is not so now.

Rangoon.

28. In Burma strong complaint was made to us by the Burma Chamber of Commerce as regards the delay and ineffectiveness of the official assignee's office. There are certainly special difficulties in Rangoon, particularly as regards absconding debtors, and some of the cases instanced before as cases of delay were cases of very special difficulty. The complaints against the official assignee's office are before the High Court and we leave such matters of administration in the hands of the proper authorities who alone can conduct due enquiry into them. We understand that some of the representations of the Chamber of Commerce have already received attention. We do not doubt that the High Court will do what it can to insist upon the filing of proper schedules at an early stage, adequate public examination of insolvents, prompt

distribution of dividend, and so forth. The Chamber of Commerce is justified in laying great stress upon these requirements.

Madras.

29. In the Madras High Court a special feature of the insolvency work is that, under the authority, apparently, of section 7 of the Act, the High Court in insolvency proceeds to collect debts due to the insolvent's estates, and also to require secured creditors to realise their security by means of sales carried out by the official assignee. The provisions of section 7 have since 1920 been incorporated, broadly speaking, in the Provincial Insolvency Act. They have been part of the English bankruptcy statutes for a long time. In the country of their origin these provisions have never been regarded as intended to put persons, whose creditors become insolvent, in any worse position than or in any different position from other people. The creditors of an insolvent, with claims upon his estate, have to realise their claims through the insolvency court. When the trustee or the receiver desires to assert a higher title than the insolvent, *e.g.*, to rip up some transactions of the insolvent, the necessary proceedings are brought in the insolvency jurisdiction. Again, proceedings against the trustee or receiver can generally be taken under the insolvency jurisdiction because the trustee has no right to object to be sued in his own forum. It is another matter altogether when "A," "B," and "C," who could not have been sued by "X," save in their own local Small Cause Court, are required to show cause before the High Court of Madras and to have the claim decided there in a form of proceeding described as a "garnishee summons." An insolvent may be adjudicated in Madras although as a matter of substance he belongs to some part of the mofussil [*cf.* section 11 (*a*)]. An adjudication is sometimes a mere consequence of an arrest for debt having been made in Madras. In the like manner the mortgagee of an insolvent is usually considered to be entitled to special expedition in realising his security if he so desires. Under Article 18 of the Second Schedule to Act III of 1909 it is made very clear that no mortgagee is obliged against his will to take part in any summary proceeding; and, in principle, it is sufficiently plain that a mortgagee may rely upon his security and ignore the insolvency court altogether. It seems to us that the form of letter and the form of summons in use in this court by the official assignee and the court in respect of the insolvent's mortgagees are objectionable and should be revised at an early opportunity.

We do not presume as a Committee to differ from the view taken by this High Court as to the extent of the powers conferred by section 7 of the Presidency Act. For anything we are entitled to say a summons in insolvency requiring the insolvent's mortgagor to pay the amount of the mortgage money to the official assignee, or suffer an order that the official assignee should sell the mortgaged property, may be within the competence of the insolvency court in view of the section. We appreciate also that official assignees like other people must frequently be hampered by the

circumstance that it takes a long time to recover money by litigation. We think it anomalous, however, that this view should be taken by one court alone; and if, now that the Provincial Act, section 4, contains the same provisions in substance as are contained in section 7, this practice is to spread, it will produce the most serious disadvantages, and much dislocation of our legal system. A very substantial proportion of the time of one of the two Original Side Judges in this High Court is occupied, as we understand, with this class of work, some of it necessarily of a small cause court nature. In our opinion on any view of the powers conferred by section 7 of the Presidency Act, exercise of jurisdiction of the kind we have described is anomalous and objectionable. Much as we desire to sharpen the weapons at the disposal of the insolvency court, we think the exercise of these powers should be abandoned and that the practice should be restored to that obtaining in other Presidency-Towns and in England.

30. We were told that in Madras there is some delay in the giving of appointments for public and private examination. In insolvency it cannot be too strongly insisted upon that the holding of these examinations is a very important duty, and that arrangement should be made for sufficient and regular sittings.

31. The official assignee in Madras is not allowed to draw commission upon the sale of mortgaged property except so far as the balance accruing to the estate is concerned. It appears that elsewhere he is allowed to draw commission upon the total purchase price. We understand that the Judges of the High Court were in favour of the rule as to commission being made the same in Madras as in other Presidency-Towns, but that the Local Government was of a contrary opinion. Of late years, we understand that property has fallen in value in Madras and that the official assignee in the interest of insolvent estates has much work to do in the sale of mortgaged property which benefits both the mortgagee and the unsecured creditors. We would draw attention to the rule, framed by the Calcutta High Court under the Provincial Insolvency Act, which seems to us in this matter to have followed a reasonable *viâ media*. This rule (No. 13-2) is as follows:—

> "When a receiver realises the security of a secured creditor, the court may direct additional remuneration to be paid to him with reference to the amount of work which he has done and the benefit resulting to the creditors."

We think that this might be considered by the Local Government and the High Court. The matter, however, does not effect good administration so directly as to justify this Committee making any direct recommendation on the subject.

32. The main difficulty of administration under the Act of 1909 is that nowhere are the provisions authorising the appointment of a committee of inspection consistently or adequately worked. They seem, indeed, to have fallen into disuse. In view of the fact that the person who administers the insolvent estate is, in India,

an official and not a trustee in bankruptcy appointed by the creditors, the necessity for a committee of inspection is even greater in India than in England. Apparently, however, the fact that the administration of the estate is in the hands of an official is regarded by business men, who ought to know better, as a reason for thinking it useless to serve on committees of inspection. We were informed by the Bombay Chamber of Commerce that until the management of the official assignee's office has been thoroughly overhauled, it will be impossible to get suitable persons to serve on such committees, but that if the Insolvency Act were amended by permitting the appointment of trustees in bankruptcy in the English sense, it might be easier to persuade persons to agree to act as members of such committee. We were also informed that experience alone can show whether this would be so, or not. We fail altogether to see why the fact of the administrator being an official, or the fact of improvement being called for in his office or in his methods, makes it reasonable for creditors to refuse their assistance in the task of managing property which though nominally the insolvent's really belongs to themselves. No great improvement in insolvency administration is in the least likely to be brought about save by creditors taking more interest in their own affairs.

33. If the English system could be introduced whereby the official assignee represented the public interest but it was open to creditors to have a nominee of their own appointed as trustee of the insolvent estate, this might in some difficult cases improve matters. It is, however, open to the court under the present law to appoint a special manager when necessary. It has also to be noted that if estates in which the assets were substantial were to be administered by a nominee of the creditors, the commission which at present goes to the official assignee or to his account would be lessened. We are not accordingly prepared to recommend that the English system should be introduced into the Presidency-Towns.

34. If sections 24 and 25 of the Presidency-Towns Act be examined it would appear that there ought to be no room, whatsoever, for a complaint that the courts do not insist upon obtaining a proper schedule of affairs from the insolvent in an expeditious manner. As we understand the facts, it is very frequently the case that on one excuse or another the insolvent fobs off the official assignee and the court and delays the filing of the schedule for months and months. During this interval it is extremely difficult for the official assignee or anyone else to protect the interests of the creditors. The only reason why the insolvent manages to delay the filing of a proper schedule is because of the weakness with which the power to grant or refuse a protection order is exercised. The continual granting of interim protection orders is in no way required by the statute, and the insolvent who has exceeded the specified time of thirty days should, save in very special cases, be refused any form of protection. An ordinary duty of an official assignee is to present before the court, at its sittings in insolvency, motions for

the punishment of debtors who have not shown themselves diligent in complying with requirements of the Act. The practice ought to be, as we understand it in some courts is, that interim protection should be granted in the absence of a schedule only for due cause, and as a general rule only where the official assignee does not oppose: also that if debtors delay filing their schedules in spite of the refusal of a protection order, the official assignee should have instructions to proceed against them for contempt.

35. The Bombay Bar Association brought to our notice a difficulty which has arisen under section 17 of the Presidency-Towns Act. There is a Madras decision in the case of "Easwara Iyer *v.* K. Govindrajulu Naidu," I. L. R. 39, Madras, 689, to the effect that a notice in execution under Order 21, rule 37, cannot validly issue against a debtor who has been adjudicated an insolvent, save by leave of the insolvency court, and that any application in execution against the insolvent is incompetent; it being *ultra vires* of the execution court to take any security from the judgment-debtor or to do anything whatsoever, even if the insolvent fails to claim the benefit of section 17. Whether this is correct law or not may be doubted. We understand that in the Bombay High Court the practice is to issue such notice and to make an order for arrest unless within a given time a protection order is obtained. There can be no doubt that the practice of the High Court is in accordance with the scheme of the insolvency law and that the practice should be made clear accordingly. We understand that the Small Cause Court in Bombay follows the Madras decision and that a debtor, so far as this court is concerned, need not even apply for an interim protection order.

36. In England the right of audience in bankruptcy is given in the High Court, as well as in other courts, to solicitors, and is not reserved for counsel; thus solicitors may argue a bankruptcy motion before the judge or a bankruptcy appeal before a Divisional Court though not before the Court of Appeal. We think that this right should be given to attorneys in all High Courts as it is given in Madras. It is for consideration, in view of the new position created by the report of the Indian Bar Committee whether special rules giving a right of audience in insolvency matters to vakils as such should not be introduced into each High Court. We understand, for example, that in Bombay an insolvent is allowed to be represented by counsel without the intervention of an attorney. We consider that the English precedent is ample justification for giving creditors and others interested in insolvency a special right to appear by their attorney without counsel.

37. Difficulty is occasioned in getting possession of property in Indian States belonging to insolvents adjudicated in British India. We understand that the States of Kathiawar, Cutch and Baroda are those of most importance from the point of view of the Bombay insolvency jurisdiction. The elucidation of this problem may require the aid of the Foreign Office. We are unable to make a sufficient study of the matter to justify direct recommendations.

38. With reference to section 104 of the Act of 1909 we would call attention to the necessity for including a provision such as is comprised in section 70, sub-section 5 of the Provincial Act (Act V of 1920), and to our remarks in Part I of this chapter (paragraph 16) in this connection. In most cases it is much better that insolvency offences should be dealt with in the police court than that they should be given a sort of State trial in the High Court with special and peculiar facilities of appeal.

CHAPTER 15.

High Courts (Original Side).

The powers of the Chartered High Courts to regulate their own procedure in the exercise of their original jurisdiction are, in view of section 129 of the Code, so complete that the chief service which we can render in respect of Original Side work is to call the attention of the judges of the different courts to the complaints made and the suggestions advanced before us. Calcutta, Bombay, Madras and Rangoon are very differently circumstanced so far as Original Side work is concerned. Their traditions are different, the regulations governing the profession are different, the court fees system is different, and the volume and the character of the work is different. The division of work and the classification of cases by means of cause lists is very materially different. It seems reasonable to assume that in any matter of detail the learned judges of the Court or a committee of them would be in a better position to suggest amendments than we can expect to be. We think, however, that some good would result to Original Side work if in each court the practice and methods of other courts were more fully known. We think it possible that an attempt to state roughly the leading features of the Original Side in the different provincial capitals may lead to a loosening of mere local traditions and some consequent improvement.

Calcutta.

1. The work on the Original Side of the High Court at Calcutta has in recent years shown a marked increase. During the three years prior to July 1924 the average number of judges sitting per working day for Original Side work, including sessions, was 3·9. This has not been sufficient to cope with the work and the contested non-commercial cases have of late borne the brunt of the delay. If we try, for the last few years, to find out the number of cases instituted, the number of cases awaiting disposal, the number disposed of, and the number pending at the end of the year, the following table represents the facts:—

Year.	Pending from last year.	Filed, etc.	Total for disposal.	Disposed of.	Pending.
1	2	3	4	5	6
1917	1,888	1,377	3,265	1,278	1,987
1918	1,987	1,821	3,808	1,185	2,623
1919	2,623	2,776	5,399	1,482	3,917
1920	3,917	2,664	6,581	2,016	4,565
1921	4,565	3,721	8,286	2,908	5,378
1922	5,378	3,707	9,085	3,763	5,322
1923	5,322	3,439	8,761	4,270	4,491

These figures, taken from the administration reports, give a correct idea of the growth in the volume of work but the figure of pending cases is perhaps liable to be taken as showing the state of things to be worse than it is. The last column comprises cases newly instituted which will not be ripe for hearing for a good many months. It comprises also a considerable number of cases which for one reason or another are not ripe for hearing, do not appear in any list of prospective suits, and which will never in a substantial number of instances be brought on for trial. The actual number of contested cases ready for hearing and awaiting disposal on the Original Side of this High Court at the close of the year 1923 was 325. It has been found, on an estimate made after examination of more than 10,000 recent disposals, that 24·5 per cent. were contested, 30·6 per cent. undefended, 16·5 per cent. settled, and 28·4 per cent. struck off. These percentages applied to the number of present pending cases give an indication of the pending work before the court. The 4,491 cases pending at the end of 1923 should, therefore, yield 1,100 contested cases.

The contested disposals in a year now average 1,005. The 325 cases ready for hearing were defended suits only and represent about a third of the year's work. As a matter of fact, during 1924, the number of contested cases set down by the parties as ready for trial was greater than the number of such cases disposed of. By 25th July 1924, the figure 325 had risen to 479, by 15th November (when the long vacation ended) it was 536 and on 6th December 1924, it was 572.

2. So far as institutions are concerned the figures show the same variation as that to be noticed in the other High Courts. After the Armistice of November 1918, the Court was flooded with claims brought by sellers of piece-goods against buyers. These were a consequence of a very serious fall in prices experienced in the piece-goods market. Later on fluctuations in exchange and in the prices of jute and cotton shares had a noticeable effect in adding to the volume of litigation. It is thought that 1923 may be looked upon as the year in which shrinkage in the volume of business has definitely commenced. How long and how far this shrinkage will continue depends upon circumstances which we are in no position to estimate in advance. The figures available for 1924 up to 6th December, indicate a slight decrease from the figure of institutions in 1923.

3. In Calcutta suits are instituted by a plaint—more modern and less lengthy than the old English Bill from which it is so manifestly derived. It is not, however, save in specially favoured cases, drawn in the same manner as a Statement of Claim would be drawn by an English Barrister practising in London. In Banbury *versus* Bank of Montreal (1918) A. C. 626 at p. 710 Lord Parker said some harsh things about the modern English form of pleadings. For anything we are prepared to say pleading in the Calcutta High Court may be as good as anywhere else in India, but it falls considerably short of being even reasonably good. The

English rules of pleading and many of the English forms have been incorporated in the Code of the Civil Procedure. They receive, however, too little attention. In many cases we believe that the fault is due to the circumstance that the plaint is not drafted originally by counsel, but is drafted, much as an affidavit might be drafted, in the attorney's office, and is then sent to counsel to settle. In these circumstances it must often happen that the " settling " produces but a minimum of change in an original draft that was incorrigible.

4. The claims which are instituted in this Court comprise suits of all kinds and values, not being of the small cause type and under Rs. 1,000. They are brought in the High Court because the cause of action or part of it has arisen within the limits of the City of Calcutta. A suit of the small cause type if between one thousand and two thousand rupees in value may be brought either in the High Court or in the Presidency Small Cause Court. If it is brought in the Presidency Small Cause Court, then the defendant has a right to have it removed to the High Court under section 39 of the Presidency Small Cause Court Act. This Act by its terms requires the High Court to remove the case to its own file unless the judge is of the opinion that the application has been made solely for the purpose of delay. A condition, however, is imposed as a term of the applicant's right to the order of transfer, namely, that unless the judge otherwise directs the applicant should be required to give security for the amount claimed and costs of the suit. We believe that section 39 is in this court applied at the present time in accordance with its real intention. Not many such applications are, in fact, brought. During 1922 28 cases appear to have been, in fact, transferred on applications made during the year under section 39.

5. The rules which prescribe the procedure by which, and the time within which, the writ of summons is to be delivered to the Sheriff for service were subjected to some little criticism before us by the representatives of the Incorporated Law Society. Their suggestion was that there is room for a slight increase of expedition and that the writ of summons, if prepared by the plaintiff's attorney and filed with the plaint, might be required to be delivered to the Sheriff for service within seven days (as at present notices of appeal are required to be). They suggested also that it is entirely unnecessary to continue to require a translation of the writ to be made in the Sheriff's office. As this is not found to be necessary in the case of processes of the Small Cause Court, or in other cases which might be mentioned, we think that the requirement might well be abolished. It is matter for consideration whether the present requirement should be retained in the case of writs issued under Order 37.

6. As regards service of the writ of summons, it was suggested to us that it would be an advantage if this could be done by attorneys' clerks. Under the High Court rules most processes may be served by solicitors' clerks, but a summons to defendant to appear

and answer is among the exceptions, and will be found to be expressly excepted by Order 49, Rule 1 of the Code. We think that in some cases it would be highly advantageous if solicitors' clerks were allowed to effect service of summons. We suggest as a matter for consideration by the judges that a system might be introduced whereby certain specially suitable clerks should be authorised by the Sheriff to serve processes as is done for example in Bombay.

7. In India a plaint is supposed to be accompanied by the document or documents on which the plaintiff relies, or by a list of such documents. In commercial and other cases where it is not expected that the defendant will put up any serious defence a requirement of this sort may become somewhat of a nuisance. This fact was pointed out to us in Bombay. So far as Calcutta is concerned we think that the rule operates without difficulty and that in substance discovery of documents is dealt with after written statement has been filed. It was pointed out to us, however, that rule 17 of Order XI, which gives ten days to comply with the request for an appointment to inspect documents is too long and that this period might advantageously be shortened to seven days.

8. In this Court the simpler interlocutory work is done by the master or the registrar. The rest of the chamber work is taken by a single judge who also takes motions, *ex parte* cases and short causes. We were not told and we are not aware, that any substantial further devolution of chamber work to relieve the judge in chambers is called for.

The following statement gives the distribution in recent years of the work in interlocutory applications:—

Year.	Judge.	Registrar.	Master.
1917	4,493	..	3,382
1918	5,311	..	3,398
1919	6,643	2,910	3,146
1920	7,523	2,341	3,701
1921	8,724	2,697	4,213
1922	10,140	79	8,401
1923	9,961	35	6,986

9. An important feature of the practice is that issues are settled on the conclusion of the opening of the plaintiff's counsel, that is in the course of the hearing of the case. Whatever criticism may be made upon the pleadings, it cannot be said that the pleadings are so incorrigibly bad as to give the parties insufficient notice, in practice, of the case which they have to meet. If by way of exception the pleadings should in any particular case be entirely insufficient for this purpose it is, of course, open to the party aggrieved to apply for further discovery in some form. This method of settling the issues at a time when each party knows his own case, knows what he can expect by his evidence to prove, and knows what it is idle to dispute, works well. It is in striking

contrast to the mofussil practice whereby the settlement of issues takes place at a time when the parties or their representatives have a minimum amount of information as to their own case or their opponent's case.

10. As regards the classification of work, separate lists are kept for Commercial causes, Liquidated claims and other causes; a special list for Short Causes is also kept. Speaking broadly the method adopted in this court is, to give no fixed dates for hearing save for special reason, to hear cases in their order as they stand in one or other of the prospective lists, to put each judge in charge of a particular list or lists, to give warning in the daily cause list of those cases which are about to go into the peremptory list for hearing and to require attorneys and parties to work by these lists and thus to know from these materials when to be ready. If for any special reason a case has to be postponed, the judge does not find himself in the position of being unable to give another date for hearing for months and months ahead. The case can keep its place in order of priority and can be taken on the following day or two days or a week thereafter. In a case of special urgency, or where a large number of witnesses from a distance have to be heard, it is possible to fix a suitable date a few days ahead and, subject to any part heard case, to make that date effective. Attempt is made to put down for a given day a reasonable number of cases and no more. We think, moreover, that the attorneys and the parties get as much notice as is practicable of the contents of the next day's cause list.

11. There is, however, one speciality about the Calcutta cause list. When a case is ready for hearing, it is the duty of the plaintiff to see that it is set down in its appropriate prospective list. If the plaintiff does not do so the defendant may. It not infrequently happens that cases are brought but not actively pursued, whether because the plaintiff's case is weak or because both parties are afraid of one another or for some other reason. It is provided by rule, that if a case is not set down for hearing in any prospective list within six months from the date of its institution, the Court will give notice to both parties and the case will be set down before a judge for dismissal on the ground of non-prosecution in the absence of good reason for the delay. In this way waterlogged or derelict cases are got rid of and people who bring suits in the Court are persuaded that they must either get on or get out. The figure showing the number of pending cases is in this way kept down and the work of the Court's Office is lightened in the end by getting rid of a mass of unreal litigation.

12. As regards fees, the system of *ad valorem* court fees does not obtain. Recently the scale of fees has been raised substantially with a view to making the Original Side pay its own way. Still when one compares it with what is paid in the mofussil or even in the High Court of Madras, the scale of fees is very moderate. A charge is made for drawing up the decree and this charge is slightly graduated. We are inclined to think that the practice of other

courts which make no charge on the decree, but make it at an earlier stage of the proceedings has some advantage. This matter has, however, recently received attention from the judges and we have not examined it sufficiently to justify our making any definite recommendations.

13. As regards special facilities for expedition in appropriate cases there are in this High Court several methods in full force. Thus there is a separate list for Liquidated Claims. Again, there is a special arrangement for dealing, on special application, with cases that are expected to be short. Further, there is a system of "Originating Summons" adopted from the modern practice of the Chancery Division whereby ordinary mortgage matters, partnership matters, vendor and purchaser matters, and various other matters, can be disposed of without the machinery of a suit. This system also obtains in Bombay. We think that in both Courts the practice might be modified with advantage by getting rid of the necessity of the applicant filing a document in the form of a plaint, and that the attorney for the applicant might draw up, and have issued, the originating summons without the judge having to settle it in advance.

14. As regards bills of exchange or negotiable instruments, much use is made in this Court of Order 37. Applications for leave to defend are made to the judge *ex parte*. By a rule of the High Court the plaintiff may afterwards, if leave to defend is granted, move to discharge the order. The question whether the six months limitation applies or does not apply to claims brought under Order 37 has not, so far as we know, attracted notice or been a source of difficulty. In dealing with such suits, when no leave to defend has been given and the case is set down for hearing in the undefended list, some difficulty has arisen in cases where interest is not provided for by the instrument itself, but a claim is made upon an alleged contemporaneous oral agreement for a rate of interest higher than that provided for by the Negotiable Instruments Act. The same difficulty has, we understand, arisen in other courts. It is open to a High Court by rule to extend the provisions of Order 37, as the Bombay High Court have, in fact, done, to cover other matters including such claims as claims for interest payable under oral agreements. Apart from any such extension, however, we think that the rule should be made clear and plain, that under Order 37 the plaintiff can only recover interest provided for by the document or interest at six per cent. as provided for in the Negotiable Instruments Act. It should be made plainer also that in giving judgment under Order 37 the Court has exactly the same powers as to interim interest and interest upon the decree, as it would have in any other case. All references to Order 37 in the Negotiable Instruments Act (XXVI of 1881) should be repealed at the earliest convenient opportunity. [Cf. sections 80 and 117.]

15. At one time it was thought that interim interest, that is interest for the period subsequent to the institution of the suit, should never be given where the plaintiff's claim rested in damages

and not in debt. This doctrine is not now regarded as correct and is not, we believe, either in Calcutta or Bombay regarded as imposing a limitation upon the discretion to grant interim interest expressly vested in the court by section 34 of the Code. In what are called suits for " differences ", that is for damages for non-acceptance of goods, *e.g.*, in the piece-goods market, a refusal to grant interim interest on the ground that the plaintiff's claim is logically a claim for damages is manifestly unjust.

16. We think, however, that the practice of this and other courts would be improved if a rule were made to the effect that interim interest might be given at any rate up to 12 per cent. without evidence having been called to substantiate or justify any particular rate: but that interim interest at any higher rate should not be granted except upon grounds based upon specific evidence, *e.g.*, where the contractual rate is higher.

17. Recently the Court has brought into force with slight variation the complete English practice under Order 14 of the Rules of the Supreme Court. This covers the matters dealt with in clause (*f*) of sub-section (*2*) of section 128 of the Code. The English practice has been maintained in that the question of leave to defend is decided in the presence of the plaintiff. We understand that this practice has already been found of considerable service in ejectment cases between landlords and tenants.

18. The last form of special facility is the Commercial list. Suits of a commercial character are put into a separate list and the time of one judge is devoted at present to these suits. For reasons already indicated fluctuations in trade have, in past years, produced some congestion in this list. Special efforts have, however, been made to reduce it to a minimum and we do not think that in 1924 there is any ground for complaint so far as expedition in commercial cases is concerned. At no time has this Court imposed any special rules of limitation as a condition of a commercial case being dealt with by the Commercial judge.

19. This Court has not established any special system of third party notice or counter claims. It has, however, a special system as to *garnishee orders* and as regards the substitution of the legal representatives of a party deceased. This substitution is made *ex parte* and so far as we were able to learn this system works well and without giving rise to fraud. There is a special rule whereby service may, by leave of the Court, be effected by registered post. This too has worked well.

20. We think that the most promising line of improvement as regards the practice in this Court is to be found in the suggestion to introduce the English system whereby the plaintiff in an ordinary case is required to take out a summons for directions. (*Vide* O. XXX, R. S. C.) In the Commercial Court, in particular, we think that this might very easily be introduced and might ensure the advantage which the English Commercial Court was intended to ensure, namely, that the interlocutory orders should be made by the judge who was ultimately going to try the case. Though much

use is made of the rules and orders with reference to discovery, we do not doubt that an appropriate series of directions given by the judge or master would regularise and improve the interlocutory practice and the preparation of cases. We do not think that an order on such a summons can usefully be made as a rule until after the written statement has been filed. So long as the dual system obtains in any court the work of the attorney in the preparation of the cases ought to be a distinguishing feature.

21. We were informed that as regards non-commercial cases the delay in disposal was felt as a grievance; also that the registrar's office staff was in need of being strengthened as there was some delay in copying and in issuing orders and decrees. Complaint was also made to us of delay as regards references to take accounts. So far as the registrar's office is concerned we understand that this matter has recently been specially examined. We cannot, however, emphasise too strongly the fact that congestion in the office of a Court produces inordinate inconvenience and expense to parties and their legal advisers.

22. Until recently persons called to the Bar in England were alone accorded the right of audience on the Original Side in this High Court. In view of the recommendation of the Indian Bar Committee arrangements are being made whereby persons who have qualified in India to become vakils may on certain conditions be enrolled as advocates of the court and practice as such on the same terms as those on which advocates have hitherto been allowed to practice.

23. From time to time proposals have been made for the establishment in Calcutta of a court on the analogy of the city civil court of Madras; a court, that is to say, which would try all suits except those arising in the probate, matrimonial or maritime jurisdiction, provided that such suits arose within the city of Calcutta and did not exceed a certain figure of value for the purpose of jurisdiction. Any such court would almost certainly have to charge fees *ad valorem* under the Court Fees Act. It would require a separate establishment. It would presumably have considerable execution work to do in cases in which execution was sought against immovable property in Calcutta. Whether one judge or two judges would be required is perhaps a question. It has been argued with some degree of force that a small partnership suit, partition suit, or administration suit arising within Calcutta costs the parties too much in the way of fees to the profession if it be litigated in the High Court. We do not doubt that there must be cases where the whole of the partnership or other property in dispute has been dissipated in costs. Unfortunately cases of this character are not seldom those in which a careful preparation, such as is done by an attorney, is very necessary. We are not satisfied, indeed, that such cases would not be disposed of in the High Court in a manner more beneficial to the parties and less likely to result in appeal than if they had been handled by a court of the mofussil type. We are unable to report in favour of the institution of such

a City Civil Court, whether on the grounds of economy or of expedition. We think that litigants would pay as much and receive less satisfaction under the proposed system. Cases affecting immovable property in Calcutta should, we think, be determined in the High Court. Commercial cases above two thousand rupees not infrequently call for argument and decision by lawyers specially trained in commercial matters. To get a cheap judge is by no means always an economy, and it is a matter of debate whether appeals brought from such a court as is proposed would not considerably exceed the appellate work that now arises out of the same cases. Now that work on the Original Side of the Court is no longer likely to be confined to persons who have been able to go to England, a good deal of the reason which originally lay behind the proposal no longer holds good. We consider that under the new conditions a strong Bar and a strong court on the Original Side will have a better future and a better chance to do good service to the public under the present system than if another court be established.

Madras.

1. The Original Side of the Madras High Court ordinarily engages the attention of two judges. The governing fact is that since 1892 a city civil court has been established in Madras with jurisdiction, except testamentary, matrimonial and maritime, up to Rs. 2,500, and without jurisdiction in insolvency. The city civil court exists by virtue of India Act VII of 1892; and Madras Act V of 1916. The objects for which this Court was established were apparently to create a cheaper tribunal than the High Court for the benefit of the poorer class of suitors, and to obviate the waste of judicial power involved in the system under which every petty dispute, not technically a small cause, had to be determined by a judge of the High Court. An important part of the work of the city civil court is execution of decrees of the Presidency Small Cause Court against immovable property. The Court is presided over by a single judge at a salary of Rs. 1,200 per mensem. The following clerical establishment was entertained in the year 1920:—

1 Sheristadar on Rs. 150 per mensem,
2 Translators on Rs. 70 and Rs. 50 per mensem,
11 Clerks, one each on Rs. 100, Rs. 60, Rs. 50, Rs. 40, Rs. 30, and Rs. 15, and five on Rs. 20,
1 Typist on Rs. 20—1—35,
1 Nazir on Rs. 60,
5 Bailiffs, one each on Rs. 60, Rs. 20, Rs. 17½ and two on Rs. 15,
1 Examiner on Rs. 20,
2 Copyists on Rs. 10 each,

the total cost being roughly a little over Rs. 900 a month.

2. From time to time, of late years, the work of the court has been more than sufficient to occupy the full time of the judge, and an additional judge had to be appointed for three months in

1915 and 1918. It appears that the desirability of raising the jurisdiction of the city civil court to Rs. 5,000 or even higher, has constantly been considered; especially as a means of avoiding the expense of an additional judge in the High Court. So far the limit has not been raised, largely because it was found that the relief to the High Court would be comparatively small and that such relief while not allowing the strength of the High Court to be reduced by one judge would necessitate the appointment of an additional judge to the city civil court. Moreover, for suits between Rs. 2,500 and Rs. 5,000 the cost of litigation would probably be higher in the city civil court by reason of the Court Fees Act, so that litigants would be required to pay more for a decision by an inferior tribunal. In the city civil court the initial *ad valorem* court fee for a suit of Rs. 2,500 is now Rs. 232-7-0, whereas in the High Court a court fee of Rs. 150 is sufficient for any case up to Rs. 10,000 in value. For these reasons, up to the present, the Government does not appear to have decided upon an increase in the jurisdiction of the city civil court.

3. An appeal lies from the city civil court to the appellate side of the High Court. For 1922 the average duration of such appeals was 389 days. The statistics with reference to the work before the city civil court and of the appeals therefrom are given below:—

Year.	Suits.				Execution.	Appeals.
	Number instituted.	Disposals.		Pending at close of year.	No. of execution proceedings disposed of.	No. of appeals to High Court.
		Total.	Contested.			
1914 . .	405	426	262	334	465	27
1915 . .	470	588	413	225	513	43
1916 . .	501	504	337	227	498	23
1917 . .	549	525	338	256	465	21
1918 . . .	510	453	293	318	354	19
1919 . .	448	417	267	356	361	29
1920 . .	543	608	431	310	385	58
1921 . .	661	607	379	473	451	65
1922 . .	553	688	478	362	366	68
1923 . .	582	616	379	346	542	147

4. As regards the raising of the pecuniary limit of jurisdiction of the city civil court, the fact is, that the figure of Rs. 2,500

was originally chosen because it was, at the time the court was established, the limit of the powers of the district munsif. The district munsif's powers have since been raised to Rs. 3,000, and we understand that there is a proposal that they should be raised to Rs. 4,000 or more. It is certainly anomalous that the jurisdiction of the judge of the city civil court, who is an officer graded with reference to his pay as equal to a district judge of the lowest grade, should be lower than that of a district munsif. It may, moreover, lead to practical anomalies, *e.g.*, in the case of cross suits brought in a munsif's court and in the city civil court. The latter would have to stay its hands and wait for the decision of the district munsif, or if both suits were ordered to be tried together they would have to be tried by the district munsif. There might also be anomaly in connection with the doctrine of *res judicata*. It was apparently to avoid such anomalies that the jurisdiction of the city civil court was originally made uniform with that of the munsif in the mofussil. It may be observed also with some fairness that if the fall in the purchasing power of the rupee is in a large degree justification for raising the pecuniary limit of the district munsif's power, this reason is equally valid in connection with the city civil court.

5. Any such increase of jurisdiction would lead to an increase in the work to be done and would entail the appointment of an additional judge in the city civil court. In so far as relief was afforded to the High Court this would, however, be a substitution of a less expensive agency to do the same work. At present the average duration is shorter in the city civil court than on the Original Side of the High Court. We cannot help thinking, however, that if an increase of jurisdiction is to be granted to this court the present scale of judge's pay should be substantially improved. Of suits brought on the Original Side in 1923

43 were between Rs. 1,000 and Rs. 2,500,
239 ,, ,, ,, 2,500 and ,, 4,000,
and 118 ,, ,, ,, 4,000 and ,, 5,000.

6. Coming now to the Original Side of the High Court the present state of its work may be gathered from the following figures: —

Year.	Instituted during the year (excluding cases received by transfer, etc.).	Total for disposal.	Disposed of.	Pending at close of year.
1919 . . .	915	1,518	680	838
1920 . . .	1,006	1,865	811	1,054
1921 . . .	1,170	2,262	1,033	1,229
1922 . . .	1,105	2,379	1,073	1,306

7. The main thing which struck us at Madras was that this Court carries on in strict accordance with the provisions of the Civil Procedure Code, summonses being issued for settlement of issues, and a substantial part of the time of one of the two judges is occupied by what is called the Issue Court. This means that a long time before the hearing and at a comparatively early stage of the case when neither party has gone to any great trouble or expense in preparation, the judge settles issues as in the mofussil, notwithstanding that the legal advisers of the parties in a Presidency Town are, presumably, competent when drafting pleadings to frame them in such a manner as to serve the purpose of a pleading. We have no hesitation in saying that if the Issue Court, as it is called, were abolished altogether much waste of time and effort would be saved. However ignorant, or uninstructed, or badly instructed the legal profession in a Presidency town may be supposed to be it cannot be necessary to occupy the time of a High Court judge in the work of finding out the points on which the parties are at issue. If any party is in doubt, the provisions for obtaining further particulars, and other provisions as regards discovery, enable him to have his doubt solved. It is necessary in the mofussil for the court to cope with the ignorant litigant or the uninstructed junior pleader, by taking the plaint and the written statement and setting out succinctly the various issues, after attempting to get the parties to reduce their dispute as much as possible. In any case of incorrigible pleading, where the aggrieved party has not taken the proper steps before the hearing to get the pleadings into a reasonable condition, it is always open to a judge at the commencement of the trial to make the necessary orders as to amendments, as to adjournments, and above all as to costs. So far as we know the profession in Madras is just as capable of pleading properly as the profession anywhere else, provided always that it is made to do so and talked to properly when it fails to do so. If issues are settled at the end of the plaintiff's opening, when each party is in full possession of his opponent's case, and of his own case, much less trouble will be required to obviate gratuitous and unnecessary issues.

8. Comment has been made that time allowed for lodging the summons with the Sheriff and the time given for appearance is longer than necessary.

9. The general opinion in Madras appears quite rightly to be in favour of machinery whereby ordinary interlocutory work may be done in the first instance by a subordinate officer to be called a registrar or master and not by the judge. There must in these cases be a right of appeal to the judge, but there is no justification for the vast mass of ordinary interlocutory business coming directly before the judge. Questions of the appointment of a receiver, of the granting of an interim injunction, and other important interlocutory matters must necessarily come directly before the judge, but such matters are a comparatively small proportion of the total volume of interlocutory business. We appre-

ciate that some delegation has already been made and we have been referred to Rule 542 of the High Court Rules. We think, however, that further delegation might be made and that the officer should be given full power over costs in all matters coming before him. This will become of great importance if the system of "summons for directions" is, as we think it should be, made compulsory.

10. As regards the office of the High Court some complaint was made before us as to the time taken in obtaining copies. We do not, however, think that the position as to this can be very bad as this was not made a matter of substantive complaint by the Attorneys' Association. Still no form of delay is more unnecessary, unprofitable or annoying, and from time to time the copying department should, as necessary, be given additional assistance to clear off arrears.

11. Apart from the Issue Court and the interlocutory work a considerable proportion of the time of one of the two judges is occupied in insolvency work by reason of a system special to Madras whereby debts, due to insolvent estates, are recovered by proceedings taken in the insolvency. This matter is dealt with in another part of this report.

12. As regards cause lists, it is the recent practice of the Court to divide cases into four lists. Class "A" consists of commercial cases, suits for movables or money, claims for damages, for breach of contract or for tort, suits for dissolution of partnership or for the taking of partnership accounts, and suits for injunction. Class "B" comprises suits for immovable property, suits for specific relief, administration and maintenance suits, suits relating to private trusts and mortgage deeds, suits under the Hindu and Muhammadan law of inheritance, succession, partition, adoption and the like. Class "C" comprises matrimonial suits and Class "D" testamentary suits. It should be noticed that while commercial cases are included in Class "A," special treatment and expedition in the manner of a commercial cause is asked for or given in a very few cases only. The number of such applications in recent years is:—

1920 . . .	One.
1921 . . .	Seven.
1922 . . .	Four.
1923 . . .	Seven.
1924 (to August) .	One.

The reason so far as we can judge is that the profession has not adapted itself sufficiently to the idea of a commercial court and that the clients do not sufficiently appreciate the facilities which such as court provides to insist upon their lawyers utilising them.

13. By Madras Act V of 1916 suits of the small cause type may be brought in the city civil court if over Rs. 1,000. As regards the removal from the Presidency Small Cause Court of

suits which exceed the value of a thousand rupees, such removal may be made by the High Court either to the High Court itself or to the city civil court. In either case the provisions of sub-sections (*2*), (*3*) and (*4*) of section 39 of the Presidency Small Cause Court Act XV of 1882 apply to the case. We think it worth while to observe that the application contemplated by the first clause of section 39 is an *ex parte* application, that the defendant is given a certain right, but a right coupled with a condition. The condition appears to us to be just as useful in the public interest as in the interest of the plaintiff. Any practice whereby such applications are disposed of by the making of unconditional orders of transfer to the High Court, by consent given by the lawyers of both sides, is apt, we think, to lead to a certain amount of evil. We would respectfully recommend that the practice under section 39 of this Act should be strictly in accordance with its terms.

14. At the actual hearing of a case the officers of the court, sitting before the judge, are, we understand, an interpreter, a shorthand writer, and bench clerk, the last named on a salary of about Rs. 150 in place of a deputy or assistant registrar who till recently acted as clerk of the court.

15. The only provision for obtaining summary judgment in this Court is Order 37 of the Code. We understand that applications for leave to defend are made in the presence of the plaintiff and not *ex parte*. A complaint was made to us that Order 37 has not been of much use to plaintiffs in practice, but, whether this be so or not, we would respectfully recommend that this High Court should establish machinery whereby plaintiffs may obtain summary judgment either on the lines of the English Order 14, R. S. C., or else by the application of Order 37 to the class of cases mentioned in clause (*f*) of sub-section (*2*) of section 128 of the Code.

16. As regards the taking of accounts, this is done by an officer called the official referee. Sales in mortgage suits are conducted by him and the auctioneer's commission in respect thereof goes to Government and helps to finance his post. The registrar, however, settles the proclamation of sale. In account cases the system of costs whereby vakils get an *ad valorem* fee seems to operate disadvantageously as it is not calculated to make the vakil take the same interest as is taken by the attorney who would be entitled to charge for each attendance.

17. There is in this Court no procedure by way of originating summons whether in vendor and purchaser or in other cases, though there are, of course, certain original petitions, *e.g.*, under the Trust Act. We think that "originating summonses" might be introduced with advantage.

18. There are two matters with respect to which we have noticed complaints which seem to have some degree of justification. The first is that too many cases are frequently posted before a single judge for hearing on a given day. This is a practice which is frequently defended on the ground that it obviates all chance of the Court having to adjourn for lack of ready cases. It is very

important to make sure, however, that the number of cases liable to come on for hearing before a given judge on a particular day is carefully limited. Experience shows that cases which are very low down in a long list are seldom ready if the list collapses. It is unfair to legal practitioners to expect them to provide against the possibility of cases requiring their attendance at the same time in different courts unless great care be taken to have no more than a reasonable margin of work listed before a given judge for each day. Applications for adjournments on all kinds of suspicious pretexts are inevitable when long lists of cases are posted. The rule ought always to be that no case should be liable to be called on unless it is probable that it will be called on.

19. Strong representation was made to us by one witness as to the crowded and disorderly condition of the Courts. This is a matter of great importance and is due to the arrangement of the buildings. The Judges complained of it to the Bar Committee. It is difficult in India to prevent courts becoming crowded with people who do not understand the language of the Court and who are apt to talk and to keep up a buzz of confused noise. Having regard to the crowding of the courts and the large number of public passages round them it is specially difficult in this High Court to preserve the necessary silence in the courts themselves, but we have no doubt that the learned judges will take stringent action whenever necessary and possible.

Bombay.

1. The Original Side of the Bombay High Court is the largest Original Side in India. The following figures may be taken to show the position for some years past:—

Year.	Pending from last year.	Filed and restored.	Total for disposal.	Disposed of.	Pending.	Ripe for hearing.
1917. . .	785	1,479 143	2,407	1,516	891	209
1918. . .	891	2,072 163	3,126	1,444	1,682	841
1919. . .	1,682	3,768 190	5,640	2,973	2,667	1,625
1920. . .	2,667	3,808 195	6,670	2,922	3,748	2,559
1921. . .	3,748	5,435 201	9,384	5,127	4,257	2,375
1922. . .	4,257	5,920 249	10,426	5,470	4,956	2,744
1923. . .	4,956	5,256 346	10,558	5,759	4,799	2,358

2. During the last five or six years the increase in litigation has been exceptional and to all appearance has been produced by causes which are temporary. The Armistice led to a collapse of the piece-goods and other markets, thus giving rise to hundreds of suits for breach of contract. From 1919 to 1921 there was exceptional activity in the buying and selling of shares. A land boom and the subsequent slump led to many suits relating to the sale and purchase of immovable property. The policy of rent restriction has been responsible for a very considerable expansion of the work of the Court as between landlord and tenant. During all this time financial stringency and the tightness of money has led many people to defend suits for the mere purpose of gaining time.

3. The inability of this Court to dispose, in a reasonable time, of suits on accepted bills of exchange caused considerable injury to Home firms and gave rise to complaints on the part of London and Lancashire merchants trading with India. The Summary Procedure provided for such cases by the Code, *viz.*, Order 37, was rendered ineffective by reason of the requirement (Limitation Act, 1908, Article 5) that a plaintiff to get the advantage of this Summary Procedure must bring his suit within six months of the cause of action accruing. It may or may not be,—we do not as a Committee feel ourselves entitled to pronounce upon the point,—that individual judges failed to take a sufficiently strong line in the exercise of their powers under Order 37 to give summary judgment or to require security. In view of the rule of law which allows as between the immediate parties to a suit a plea of partial failure of consideration, and in view of the defences generally set up in such cases it is not surprising that a considerable number of quite unfounded defences served the purpose of preventing the plaintiff's suit being dealt with as a Short Cause. Here again it may or may not be that individual judges too readily allowed such cases to be sent to the Long Cause List. Again, for reasons which we consider on the whole to be insufficient, the Commercial List has in this Court always been reserved for cases where the plaintiff has brought his suit within a very short time (three months) of the accrual of the cause of action. Even so, however, this list was in 1919 in danger of being swamped by an inflow of many cases. In June 1919 the prescribed time of three months was by executive order shortened to one month so as to prevent the vast mass of commercial cases being filed as such, with the result that they were relegated to the Long Cause List. We are informed that no complaint was received from recognised commercial associations with reference to the time-limit but that since March 1924 the time has been extended to six months. The figures given below as regards commercial cases during the last few years illustrate what we have just described and further show that even now too little use is being made of the Commercial List as a means of expedition.

Number of Commercial Causes filed.

Months.	Years.					
	1919.	1920.	1921.	1922.	1923.	1924.
January . . .	95	*Nil*	16	18	24	6
February . .	115	2	10	15	18	5
March . . .	131	16	16	11	6	6
April . . .	115	*Nil*	13	16	7	6
May . . .	54	*Nil*	1	7	6	2
June . . .	116	2	*Nil*	6	11	7
July . . .	19	2	16	5	2	10
August . . .	6	6	15	11	5	1 (Up to 26th August 1924).
September . .	5	3	8	4	3	
October . . .	6	7	11	10	7	
November . .	1	8	12	10	4	
December . .	3	14	10	11	7	
TOTAL .	666	60	128	124	100	43

It will be seen that for the first half of 1919 the aggregate number of commercial suits was 626; for the second half 40. The numbers for the succeeding years were 60, 128, 124, and 100.

4. We understand that in this Court the view has been taken, at least by one judge, that under Order 37 the six months' limitation does not apply, but that it applies only to suits to which the High Court has under its rule-making power extended the summary procedure prescribed by Order 37. At present, however, the contrary view still prevails in this Court and it is not easy for such a question to be taken before an appellate bench. Application for leave to defend under Order 37 is in this Court made in the presence of the plaintiff.

5. The chief feature of this Court is the manner in which cases are divided into Short Causes and Long Causes. A plaint, when presented, is marked as a Short Cause if the Prothonotary considers it to be one in which there is little likelihood of a real contest. In times of stress every plaintiff is tempted to endeavour to get his case dealt with as a Short Cause. When the return date of the summons arrives and it turns out that there is a real contest the practice has been to transfer the case to the Long Cause List,

but recently a tendency has grown up to entertain a new list of cases, namely a list of short contested cases. The delay in disposing of what are called Long Causes, that is, substantial litigation as distinct from mere debt collecting business, is the disturbing feature of the present position in this Court.

Long Causes take two or three years to come on for hearing. Short Causes appear to us to get a high degree of expedition. In 1922 out of 5,873 suits instituted 1,803 were between Rs. 2,000 and Rs. 5,000 in value; the great bulk of these were Short Causes; of the rest most were commercial or summary suits. The statement below shows the position as to these suits of smaller value and also the very grave state of the Long Cause List.

Statement showing the number of cases—Rs. 2,000 and under, between Rs. 2,000 and Rs. 5,000, Rent Suits, etc., filed during the years 1917 to 1922.

Year.	Total No. of cases Rs. 2,000 and under.	Total No. of cases between Rs. 2,000 and Rs. 3,000.	Total No. of cases between Rs. 2,000 and Rs. 5,000.	Classification of cases in Column 4.				Total No. of Rent Suits.	Small Cause Court transferred suits.	Total No. of suits filed.	Total No. of suits between Rs. 2,000 and Rs. 5,000 transferred to the long cause list.	No. of long causes pending disposal.
				Short causes.	Long causes.	Commercial causes.	Summary suits.					
1	2	3	4	5	6	7	8	9	10	11	12	13
1917.	149	191	435	344	71	4	16	..	21	1,458	76	876
1918.	187	274	596	389	139	30	38	..	28	2,044	113	1,652
1919.	183	472	1,032	558	248	158	68	3	47	3,721	120	2,620
1920.	237	421	1,046	696	242	18	90	334	54	3,754	115	3,665
1921.	403	632	1,545	1,191	194	34	126	666	62	5,373	133	4,159
1922.	555	781	1,803	1,280	112	33	378	614	47	5,873	141	4,853

6. For a good many years there has been some agitation in favour of the establishment of a Court which could relieve the High Court of some of the smaller valued suits. The proposal for a city civil court has been canvassed and has been much considered both by Government and the High Court. The High Court has consistently opposed the suggestion of a city civil court.

7. An alternative suggestion, however, has recently received the approval of the learned Judges, and the Government of Bombay is, we understand, prepared to promote legislation to carry it out. This suggestion is for the granting of an extended jurisdiction to the Bombay Court of Small Causes. It is an experiment more limited in character than the setting up of a city civil court on Madras lines would be. "The proposal is to increase the jurisdiction of the Small Cause Court to Rs. 5,000 and in addition to confer jurisdiction in cases of recovery, partition, foreclosure or redemption of immovable property, partnership cases, and administration suits—all of which are at present excluded by section 19 of the Presidency Small Cause Courts Act. The proposed scheme is not without analogy to the system in England by which a certain equitable jurisdiction is vested in the County Court. When acting within the proposed extended jurisdiction, the Small Cause Court would be subject to a right of appeal to the High Court. An elaborate bill has been prepared by the Government of Bombay dealing in detail with all aspects of the proposed change. A question has, we understand, arisen as to whether the necessary legislation should be undertaken in the central Legislature or in the local Legislature. We understand that the former is considered to be the proper authority.

8. There can be no doubt that, as matter stands at present, any reasonable system whereby the Original Side of the High Court can be relieved of a sufficient number of its less important cases, to enable it to cope with reasonable expedition with the remainder of its work, will be welcomed. The Small Cause Court in Bombay is a new and commodious building, large enough to provide the necessary facilities for the additional work. The Court itself stands well in the estimation of the public. Some apprehension has been expressed lest judges accustomed to summary procedure should be out of their element when trying by ordinary procedure cases of an important character. Subordinate judges exercising Small Cause Court powers under the Provincial Act are required to adapt themselves to both types of procedure. So far as we are able to learn, this has given rise to no difficulty in practice. After the present arrears have been disposed of, we doubt whether the litigation, in cases affected by the change, will gain much either in point of expedition or economy. It is not certain whether or to what extent the present inflow of cases into the High Court will remain at or near its present level. We do not doubt, however, that something should be done to cope with the present congestion on the Original Side.

In view of the uncertainty whether once the present congestion is removed it would not be possible for the Court to keep

abreast of its regular work, and the fact (which the evidence goes to prove) that undefended cases are better and more cheaply tried in the High Court, it is for consideration whether a temporary and more limited experiment might not suffice. If it be not impossible to appoint to the Small Cause Court one or two additional judges for a limited period, the High Court might be given power by statute to remit certain of the smaller Long Causes to the Small Cause Court for trial. This procedure would, doubtless, not satisfy practitioners in the Small Cause Court and other persons who desire that some part of the High Court's jurisdiction should be permanently taken from it. Again, if nothing is done within eighteen months or a year from the end of 1924, but the High Court is kept at its present strength, it may be that the arrears in the High Court will have, by that time, shrunk to quite manageable proportions and that the necessity for any drastic alteration in jurisdiction will have gone. There is considerable advantage in this question of jurisdiction being considered under normal—not abnormal—conditions.

9. Very great complaint was made before us on all hands of the congestion in the Prothonotary's office the staff of which appears to be inadequate and unable to cope with the ordinary requirements of the Court. In view of the enormous expansion of the business of this Court it seems highly probable that the staff is really insufficient in point of number. We understand that the Local Government has not satisfied itself as to whether better organisation would enable this office to be worked without an increase in its personnel or, at least, without considerable increase. We understand too that the necessity of deciding upon some reorganisation of the Courts in Bombay has been regarded as a reason justifying the omission to take immediate steps to strengthen the office of the Prothonotary. If the scheme for extending the jurisdiction of the Small Cause Court be carried into effect the office of the Prothonotary will, doubtless, be affected thereby. The Bombay Chamber of Commerce represented to the Local Government in August 1923 that only a portion of the delays on the Original Side was due to shortage of judges and that much was due to the paucity of the staff in the Prothonotary's office. We are informed by the Chief Justice that in his opinion, which he has given to the Local Government in detail, no attempt at reorganisation is likely to improve the position without an increase of staff. We cannot undertake to decide as to this but in any case if the reorganisation of the courts in Bombay and of the office of the High Court in consequence thereof is still to take some considerable time, as indeed appears likely, it is necessary that some temporary arrangement should be made at once to enable the Original Side to cope with the work which at present has to be dealt with. Of all forms of delay and injustice that caused by inefficiency or insufficiency in the office of the Court is perhaps the least tolerable, and it has been too long tolerated in Bombay. We are glad to learn that the Chief Justice has, since our visit to Bombay, arranged for the employment of four temporary clerks and

we trust that permanent and adequate provision will not be too long delayed. The work in the office of the Testamentary Registrar should in particular be speeded up.

10. When a plaint is filed on the Original Side of the High Court the summons to the defendant is either a summons under Order 37 or a summons applicable to a Short Cause or a Long Cause. The two latter forms of summons are in form summonses for final disposal but in the case of a Long Cause the summons requires the defendant to file a written statement and serve a copy on the plaintiff within four weeks. It also warns the defendant that if the suit is not heard upon the return date of the summons it will take its turn in the general arrears list. When the Court is unable to cope with the quantity of its work the defendant naturally tries to put up sufficient defence to ensure that a case instituted as a short cause shall be sent ultimately to the long cause list. From some examples which we have seen we should judge that very little effort has been in general necessary during the last few years in order that this object might be attained. When the summons is not served in time to enable the case to come on as a short cause, upon the date mentioned in the summons, a good deal of work is occasioned in the Prothonotary's office by the necessity to extend the return date. An enormous number of such applications appear to be made in the course of the year. We suggest that some alteration in method might be possible in order to reduce their number.

11. It was brought to our notice in Bombay that the necessity for translating the summons into the vernacular might be abolished and that in any case the attorney might be allowed to make his own translation. It was also pointed out to us that it would be a convenience to parties if documents, such as a plaint, might be explained and interpreted to them by their own attorneys (as a deed would be), not necessarily by the court interpreter. It was suggested that process might be served by any attorney's clerk, also that some restriction should be put upon the number of times an adjournment can be obtained on principle, that is, by consent of the lawyers on each side.

12. One witness suggested to us that share transactions should be brought within the definition of Commercial Causes. This, however, depends a good deal upon the nature of the share transactions in Bombay. There is no principle in giving special treatment to purely gambling transactions.

13. We understand that arrangement has been made by which decrees may be drawn up and engrossed by attorneys, but that this has not, in practice, increased the expedition. The fault here cannot be imputed to the court.

14. So far as regards the time limit which prevents a case being filed as a Commercial Cause unless it is brought very shortly after the accrual of the cause of action, we are of opinion that this is an unreasonable and unnecessary condition, and we have reason to believe that the learned judges may shortly see their way to reconsider the wording of the present rule. It is absurd to suppose that

in all cases it is good business to allow no time to a debtor before suing him. In the case of plaintiffs resident in England and doing export and import business any short period of time is plainly insufficient for the purpose. This time limit should, we think, be abolished.

15. Reference has been made already to a system of "special bailiffs." We understand that practically every attorney's office has a clerk who is thus authorised to serve processes, and some of the delay in effecting service of processes in Bombay occurs, we are told, in the attorney's office, that is, in effecting service and in making a return. The bulk of summonses to appear and answer are served in this manner by attorney's clerks as special bailiffs. These special bailiffs are not paid out of the service fee, but the cost of service goes against the client in the attorney's bill. The fee paid to Government goes to Government for nothing. In other words the plaintiff pays twice for the same thing.

16. We think that in Long Causes the English system of a Summons for Directions might with advantage be introduced in this Court as well as in Calcutta. Such summonses will have to be dealt with by the Prothonotary, who is already an overworked officer. The time spent, however, in giving proper directions is in general an economy of time and when the distribution of work in the Prothonotary's office is reconsidered, as it ought to be, we trust that arrangements will be made to enable the Prothonotary to undertake this very necessary work. Whether it would be desirable to make the taking out of such a summons compulsory in every case, and, if so, at what stage, is a matter for consideration by the court.

17. As regards documents filed with the plaint, we think that in cases of the Short Cause type the practice of copying out a considerable correspondence when in fact there is little or no prospect of contest should be discouraged. It does not appear to be required by the rules.

18. One of the most difficult and yet most important of the practical questions in connection with this High Court is the question of Cause Lists. Both the lists and the arrangements for publishing them were the subject of some complaint before us. This is a matter as to which it is difficult for us to make suggestions, particularly as the experience of the Chief Justice puts him in a much better position than we can claim to occupy for deciding as to the best means of improvement. It seems plain that the daily lists are longer than might be thought desirable but for the fact that a great many cases turn out to be ineffective. At present, cases come into the Cause List operatively as a matter of office routine, there being no system by which cases have to be set down for trial as in England or in the Calcutta High Court. It seems hardly possible to follow the system familiar to practitioners in the Lord Mayor's Court in London or the Company Court of the Chancery Division, whereby the list of cases is called over at the sitting of the Court and unopposed or ineffective cases are got out of the way first. If all the judges were to follow this practice, counsel

and solicitors might find themselves required to be present in different courts at the same time. We understand, however, that it is not impossible for special notice to be given, at intervals of a fortnight or so, that a list of a considerable number of cases will be called over in this manner on a given date. A suggestion was made to us by Mr. Justice Marten that cases should be set down for trial when ready, that a fee of, say, fifty rupees should be charged at this stage, half of this to be returned provided due notice of settlement be given before the case comes into the day's list. This certainly would be an effective method of weeding or thinning the Cause List provided that rules be made for the dismissal for want of prosecution of (1) cases not set down for trial within six months of institution and (2) cases in which no step has been taken for a period of six months. We understand, however, from the Chief Justice that any such system would be impossible unless additional assistance were available in the Prothonotary's office since the work of keeping the suit registers, as at present, is as much as the office is now able to cope with. This, however, is in our opinion a very important matter. As a well arranged system of Cause Lists is a source of immense saving of time, trouble, and money to the profession and the public, we would strongly recommend that the necessary office staff should be provided to enable the Chief Justice, either on the lines above suggested or otherwise, to make a substantial improvement in the arrangements. We are not unaware that from time to time schemes have been put forward and efforts made to effect improvement. Last year a list of old suits was called on before one of the judges and a large number were disposed of. Again, it may be possible to provide that suits of a certain age should be put into a "Stayed List" until one of the parties takes steps to have a date fixed for the hearing. We draw attention to this matter in the hope that these efforts will be renewed in more favourable circumstances when the question of the office staff of this High Court is dealt with.

19. The settlement of issues is done at the commencement of the trial, *i.e.*, before plaintiff's counsel opens his case. This is much the same—not quite the same—as the Calcutta practice.

20. Shorthand writers are not provided in this Court for the recording of evidence; everything depends on the note taken by the judge himself. This is a heavy strain upon the judges and at times must result in a somewhat unsatisfactory record—particularly of cross-examination. It seems, however, impossible at present to expect that a staff of shorthand writers should be provided for some half a dozen courts. It might, however, be considered whether a sufficient staff of shorthand writers to take down the evidence in one important case and to have the transcript ready by the following morning might not pay for itself out of the fees charged to parties in the more important cases. In some cases attorneys and parties regard it as a great advantage to have a shorthand note of the evidence, and are well able and very willing to pay for a transcript.

21. As regards removing cases from the Presidency Small Cause Court under section 39 of the Presidency Small Cause Courts Act, the Bombay High Court has by rule fixed the amount to be deposited as security for costs at four hundred rupees. This is unexceptionable, so long as it is quite clear that unless the judge has expressly dispensed with the requirement of security for the claim such security will be required in addition.

22. The arrangements for the taking of accounts and for references before the commissioner seem to us to be satisfactory. We understand that this officer sells all mortgaged properties or properties requiring to be sold in administration or partition suits. We would suggest that special care might be taken in this office to see that money is not spent unreasonably upon advertisements out of deference to rules which require amendment. The officers concerned with selling property might usefully submit suggestions to the Chief Justice with a view to promote economy in this matter.

23. So far as the sheriff's office is concerned this may be regarded purely as a Government office, employing in addition to the deputy sheriff, a head bailiff on a maximum salary of Rs. 400, a cashier on Rs. 250, a third clerk on Rs. 150, and other clerks at varying salaries. The representatives of the Bombay Incorporated Law Society were of opinion that the staff was insufficient and should be better paid. So far as can be seen, the establishment is one which produces very considerable profit to Government even when all concealed debits are taken into account.

24. The receiverships apart from insolvency in this court are, as a matter of practice, given to one and the same individual, who is an official receiver in everything but name and does the work of an official liquidator as well. This officer sells a good deal of immovable property and is paid by commission and by fees. There is no maximum remuneration for this post. His accounts are passed before the commissioner and are audited by a chartered accountant. Every estate is charged a proportion of the office expenses, no one estate being ever charged more than Rs. 30 a month for this purpose. Clerks specially appointed for work in particular estates are paid out of the assets of these estates. This official does not hold himself responsible, in the fullest sense of the word, for mofussil properties belonging to estates, as the Court in general gives him power to appoint a manager. He would appear, however, to have the duty of supervision. The powers mentioned in Order 40, Rule 1, of the Code can safely be entrusted to this officer and should in general be incorporated in the order of appointment. His practice is not to sue without getting first a guarantee for the costs. The debtors to an estate are given instalment facilities when they are minded to do their best, but execution is found to be a matter of difficulty in the Small Cause Court, especially as regards instalment orders in rent cases. Whether in the course of time it will be thought necessary to appoint an official receiver in the strict sense and to make him an officer of Government holding on a definite salary and so forth, is a debatable matter. So far as we have been able to gather, this work is well done under the present system in Bombay.

Rangoon.

1. The Original Side of the High Court at Rangoon shows a certain amount of delay in the disposal of suits but the position is not so bad as in other High Courts.

From October 1922 ejectment suits under the Rangoon Rent Act were transferred to the small cause court: hence the apparent decline in the number of institutions conceals an increase in ordinary civil litigation.

The position for the years 1921, 1922 and 1923 is set out in the following table:—

Year.	Pending from last year.	Filed.	Disposed of.			Pending.	Average duration.	
			Ex parte.	On contest.	Total.		Uncontested suits.	Contested suits.
							days.	days.
1921 .	494	727	479	167	646	575	232	328
1922 .	575	677	522	253	775	477	189	308
1923 .	477	644	462	151	613	508	205	289

2. The Original Side is governed by the Court Fees Act and the costs awarded are awarded on the lump sum principle. In these respects the Court is conducted on lines that are familiar in mofussil districts. The chief causes of delay apart from the question of the number of judges are inadequacy and inefficiency of the office staff. The copying department, the translating department and the process-serving department came in for much criticism before us. So far as regards translations and copies, we were quite satisfied that there was inordinate delay of such a character as to interfere with the reasonable despatch of legal business and to intensify the risk of corruption spreading among the office staff. In view of the fact that copying pays for itself, that is to say that Government charges at least as much as it expends upon this work, it is difficult to regard post-war financial stringency as in itself a reasonable answer to the demand for more copyists. We understand that one reason why the translating and interpreting officers of the Court are not always able to give satisfaction is that a good interpreter generally gets promoted to a post, in the office of the Court, of a different character carrying higher emoluments. The service of process within Rangoon itself was described to us as being bad and we were informed that a separate staff of process-servers is kept for the High Court, but that these are insufficient in number. The general question of improvement in the service of process is dealt with elsewhere.

3. We understand that no processes are served by lawyers' clerks. In view of the fact that the dual system (attorney and counsel) does not obtain in Rangoon, the question whether some alteration should be made to enable summonses and other notices to be served without the aid of the ordinary process-server, requires special consideration. We think, however, that the learned judges, while they might hesitate to allow the service of process to be done as it is done in Calcutta, might well consider whether the service of certain processes, at all events, should not be made by means of "special bailiffs" (that is by lawyers' clerks authorised to act as process-servers).

4. We were told that in respect of commercial cases a system had been introduced a number of years ago by which it was open to a party to apply, on a summons for directions, for special expedition. This procedure, it would seem, has not been availed of to any large extent. At present for contested causes there are three cause lists—Short Causes, ordinary or Long Causes, and Commercial Causes. The representatives of the Burma Chamber of Commerce, who gave evidence before us, made no special complaint of delay as regards commercial suits though they were of the opinion that certain delay was unavoidable in the circumstances and were desirous that greater expedition might, if possible, be introduced.

5. More than one witness, speaking with considerable experience of the Court, suggested to us that the introduction of the summons for directions in all cases on the principles of Order 30 of the Rules of the Supreme Court in England would be a desirable reform, and we commend this very strongly to the attention of the authorities.

6. As regards the time given for the filing of written statement the opinion was expressed that in general some time is wasted at this stage and that the time for filing written statement should generally be shorter than the time now given.

7. We are glad to note that there is no settlement of issues at a date long anterior to the hearing of the case. We do not understand that even in the High Court counsel for the plaintiff invariably opens his case in the full sense of that expression, but it would appear that he, at least, reads the pleadings and that issues are settled thereafter, and the hearing of the case proceeds. We do not doubt that the learned judges on the Original Side will encourage in every way the practice of making a proper opening, which is of the highest value both for the settlement of the issues and for the hearing of the case.

8. Evidence is recorded, on the Original Side, by an assistant registrar and we were informed that the record is frequently defective. On the question whether shorthand writers should be entertained for the purpose of recording evidence, we were informed, first, that when evidence has to be translated it can be sufficiently recorded in long hand and, secondly, that in Rangoon it is particularly difficult to get competent shorthand

writers on a reasonable pay. Certainly, inefficient shorthand writers are of small service to any one, but we would strongly recommend that in the High Court shorthand writers should, as soon as practicable, be introduced for the purpose of recording evidence, as well as to enable judges to give judgment at the end of the argument when the facts are fresh in their minds, avoiding unnecessary labour and delay.

9. In this Court and throughout Burma generally much delay is occasioned by commissions having to be issued to courts in Madras to take the evidence of witnesses residing there. Some thing might, we think, be done to limit the time wasted by such commissions; the party applying for the commission should be made responsible for doing everything necessary to procure attendance of the witness before the Commissioner in a reasonable time. Extension of the return date of such commissions should be granted very sparingly. It may be that on this subject the High Court could usefully give more specific directions to subordinate courts by way of a circular order.

10. A special difficulty as regards execution in Rangoon appears to be that the judgment-debtor constantly evades process by going just beyond the limits of the original jurisdiction of the High Court, returning very often to Rangoon at night when he cannot be arrested. The question of the limits within which a High Court warrant of arrest should run is dealt with in our proposals in regard to execution.

11. No complaints were made to us as regards the manner in which accounts were taken in this Court. Nor did we have complaints as to the working of the instalment system, notwithstanding that the High Court of Rangoon has by special rule authorised all courts to grant orders for payment of decretal amounts by instalments even after the decree and without the plaintiff's consent.

12. We were informed that false and exaggerated medical certificates were not infrequently met with and as to this matter it might well be advisable for the High Court by rule to prescribe that affidavits should be required, at all events in certain cases.

13. There is in this Court no means of obtaining summary judgment save under the provisions of Order 37 of the Code. We think that some extension of this right might safely be made in Rangoon either in the manner carried out in Bombay or in the manner carried out in Calcutta.

14. A considerable proportion of the suits on the Original Side in Rangoon are valued at less than Rs. 5,000. Taking the figures for 1922 when the total number of suits instituted was 677, the number valued above Rs. 5,000 was 225, and the number which could not be valued at any money value was 30. Below Rs. 500 the number instituted was 158 and 69 were between Rs. 500 and Rs. 1,000. Between Rs. 1,000 and Rs. 5,000 there were 195. Thus 23 per cent. of the cases were less than Rs. 500 in value; 33 per cent. less than Rs. 1,000; and 62 per cent. less

than Rs. 5,000; while the percentage of uncontested suits was about 67 per cent. There are thus hardly enough suits of lower value to justify the establishment of another court for them. But there is distinct force in the suggestion that many of the cases heard on the Original Side are hardly of sufficient importance to require trial by a High Court Judge. We do not gather that the proposal to establish a city civil court has in the past commended itself or is likely to commend itself to the commercial community, still less to the High Court Bar. It is, however, somewhat anomolous that so many comparatively petty suits, which outside Rangoon would be tried by a sub-divisional or a township judge, should be disposed of in the High Court. Mr. Dunkley has suggested to us that the additional judge of the Hanthawaddy district court might be relieved of his Insein work which is light, and should in this way be made available to dispose of a considerable proportion of the suits which are now tried in the High Court. We have here, however, to remember that ordinary money claims up to Rs. 2,000 are provided for by the Presidency Small Cause Court and it would appear highly probable that among the numbers of low valued suits brought in the High Court there are many whose importance and difficulty is not represented by their value for the purpose of jurisdiction, and which are better tried at first instance by a High Court Judge. It is to be remembered also that, if an Original Side is necessary for a large and growing commercial community, not much is gained by trying to reduce it to minute proportions. So long as two High Court Judges are able to cope with the first instance work the preference of the commercial community of Rangoon for the present system is intelligible enough. We do not as a Committee feel it advisable to recommend the introduction in any form of a city civil court, but we think that some relief might be afforded by the introduction of " Remitted Actions " on the analogy to some extent of the English system. Use might in this way be made of the services of the additional judge of the Hanthawaddy District Court, or of the Small Cause Court. If Rs. 1,000 were taken as a limit of value for this purpose and the power to remit was made discretionary we think such a system might work well in many cases that are not of the small cause type.

Karachi.

1. The district court jurisdiction of the Court of the Judicial Commissioner of Sind corresponds in some respects to the Original Side of a High Court. This jurisdiction comprises all cases arising within the city of Karachi, and all " first class " cases arising outside the city but within the Karachi district. A subordinate judge of the second class sits at Tatta and deals with cases other than the " first class " cases arising outside the city but within the district of Karachi.

The delays in the district court jurisdiction of the Judicial Commissioner's Court are very serious. The building occupied by the Court is exceedingly inconvenient and inadequate; the subordinate staff of the Court is badly paid and of poor quality; and the arrangement as regards the management of cause lists stands in need of far-reaching reform. The figures of institutions and disposals for the last few years are stated below:—

Original Civil Suits in the Judicial Commisisoner's Court.

Year.	Pending from previous year.	Instituted.	TOTAL.	Disposed of	Pending.
1920 . .	1,522	1,340	2,862	1,094	1,768
1921 . .	1,768	1,610	3,378	1,205	2,173
1922 . .	2,173	1,161	3,334	1,220	2,114
1923 . .	2,114	1,089	3,203	1,483	1,720

2. This Court has to deal at first instance with a very substantial volume of commercial work. This work is, to a large extent, of a special character and requires special knowledge and experience of business and of commercial law. If one takes the figures for 1923 one finds that out of a total of 1,089 institutions 376 were suits for money or movables, 270 were suits under the rent law and 443 were under the heading of "title and other suits," including 101 mortgage suits. This circumstance gives rise to a special problem of real difficulty, as the table below of suits instituted in 1923 shows that the commercial work though exceedingly important is very far from being the main occupation of the Court.

SUITS FOR MONEY OR MOVABLE PROPERTY.	SUITS UNDER THE RENT LAW.			TITLE AND OTHER SUITS.					
	Arrears of rent with or without ejectment.	For ejectment or recovery or possession alone.	TOTAL.	For immovable property.	For specific relief.	On mortgage.	Others not falling under any of the preceding heads.	TOTAL.	GRAND TOTAL.
376	259	11	270	97	8	101	237	443	1,089

3. The small cause court at Karachi functions under the Provincial Small Cause Courts Act. It is accommodated in a new and

suitable building. At times the work has been known to be too heavy for a single judge, but at present the small cause court judge is able to deal satisfactorily with the volume of work, though the number of cases instituted in 1923 was 5,990 of which 1,143 or almost 4 suits a day were contested. The only serious criticism upon the working of this court, brought by witnesses on whom we can rely, is to the effect that the execution work of the court is in a bad state of arrears. For this the process serving staff is blamed by some witnesses.

4. The Karachi Chamber of Commerce and other influential bodies have long been of opinion that the Judicial Commissioner's Court should be made into a Chief Court. The reasons for this desire appear to be, first, that an improvement in the status of the Court will lead to judges remaining in Karachi instead of leaving Karachi for Bombay after a short experience in the former town; secondly, that the pay and quality of the office staff would be improved; thirdly, that a Chief Court would be able to make rules introducing more businesslike and satisfactory procedure, particularly as regards the right to obtain summary judgment, the establishment of a " commercial list " and so forth. The actual volume of work done by the Judicial Commissioner's Court is not sufficiently great to amount, in itself, to an argument in favour of raising the status of the Court. So far as rule-making powers are concerned, the Court can, as at present, with the sanction of the Local Government, or Government of India, as the case may be, make any rules that seem to be necessary. Methods for enabling the plaintiff to obtain summary judgment greatly improve the justice done in particular cases; as a means, however, of saving judge power they are not likely in such a court as this to amount to anything very noticeable. It is not clear to us how or why the raising of the status of the Court to that of a Chief Court would prevent judges leaving Karachi for the High Court of Bombay. On the other hand we think it right to appreciate as a matter of great importance the circumstance that Karachi is a commercial town, with an enormous export and import business; and that the Sukkur Barrage would appear likely in the future to increase the area and wealth of the hinterland which is served by Karachi as a sea port. Whatever can be done to improve the status of the Court so that first class commercial work can be handled in a manner worthy of a sea-port town is to be approved. We understand that the project for raising the status of the Court has been accepted by the Local Government and we do not regard it as a part of our duty to make detailed criticism of the draft bill prepared for the purpose. We desire to point out, however, with considerable emphasis that the change of status, by itself, will effect no magic; that an improved staff and improved methods are essential; and that such improvement will not come of itself.

5. Plaints, when presented in this Court, go to the office of the registrar and are there allotted in rotation to particular judges. Each judge has a sheristadar of his own—a comparatively low paid

official of whom as a class we have heard much complaint. Each judge proceeds, so far as we can see, to deal with his own list, very much as though there were three or four separate courts, and not one court with three or four judges. The reason of this is, in part at least, to be found in the mofussil practice which requires the settlement of issues at an early stage, as there is some advantage in a case being heard by the same person who has dealt with it at the issue stage. Each judge also deals with his own execution work.

6. The system as regards cause lists appears to be that dates are given for a long time ahead and far too many cases are in general put down for a particular day. When for any reason a case has to be adjourned, it is not possible, as a rule, to adjourn till the next day or the next suitable day by reason that dates for a long time to come are blocked with cases previously fixed. The rule is accordingly, as we understand, for a case which is not reached to be simply discharged, a new date being given, usually by the registrar, upon some subsequent date.

7. In addition to this, complaint was made to us by the Bar that the necessity for trying cases once begun *de die in diem* is not adequately recognised or admitted in this Court, it being not unusual for a judge after hearing some witnesses in a case to refuse to hear any more, and to take up another case and hear evidence in that for a time.

8. We think that there is room for some criticism, moreover, of the extent to which new and simple cases are dealt with expeditiously in preference to older and more difficult cases. One understands in the case of the subordinate judiciary that a desire to show good disposals, after this manner, may unduly delay the trial of more difficult suits. There ought, however, to be small difficulty in checking this tendency in the case of a court of the standing of the Judicial Commissioner's Court.

9. In the year 1922 we observe that there were 34 suits valued under Rs. 50, 46 suits under Rs. 100, 102 suits under Rs. 500 and 68 suits under a thousand rupees; that is to say, there were 250 suits under a thousand rupees instituted in the year 1922. In 1923 out of 1,089 suits instituted 788 were of less than Rs. 2,500 and 906 less than Rs. 5,000 in value. The great bulk of the suits in this Court appear to be between one thousand and five thousand rupees in value. We think that if the status of the Court is raised to that of a Chief Court something should be done to relieve the Court of the smaller type of cases. One proposal made before us was that the Small Cause Court should have its jurisdiction increased to Rs. 2,000, the registrar at the same time being given the same powers as he now has up to Rs. 50 instead of Rs. 20. We have no doubt whatever that an extension of jurisdiction of the Small Cause Court is advisable, but the questions involved in any such scheme are (*a*) whether between a thousand and two thousand rupees the jurisdiction of the Small Cause Court in cases of the Small Cause Court type should be exclusive, (*b*) whether in cases

between a thousand and two thousand rupees there should be an appeal from the Small Cause Court or merely a right of revision under section 25 of the Act, and (c) whether the Court should be brought under the Presidency Small Cause Courts Act and modelled upon the scheme for Presidency Courts. In answer to these questions it is to be observed, first, that a second judge would be required in the Small Cause Court, secondly, that the bulk of the suits instituted in each year in the Judicial Commissioner's Court are not suits for money or movables and, thirdly, that the mass of rent suits—that is ejectment suits under the Rent Restriction Act—is at present substantial, but will before long shrink very considerably, if the general policy of rent restriction is discontinued.

On the whole we think that the Small Couse Court in Karachi might be modelled very closely on the Small Cause Court recently established in Rangoon, under the Rangoon Small Cause Court Act 1920, which Court has since October 1922 dealt with cases arising under the local Rent Act.

10. In Karachi, as in Rangoon, the court fees charged are the same whether a suit be brought in the Small Cause Court or in the Judicial Commissioner's Court. If two judges were appointed to the Small Cause Court instead of one we think it would be quite possible to empower the Judicial Commissioner's Court to remit suits under the value of a thousand rupees for decision by the Small Cause Court judge, even although such suits be not of the small cause type. We see no reason why the English system of "remitted action" may not, with modifications, be used in Karachi as we have suggested might be used in Rangoon. It would, however, be quite essential that such suits should only be remitted in such moderate numbers as would ensure that the Small Cause Court Judge would be able to dispose of them and that a list of arrears of remitted cases should not accumulate.

11. As regards the system upon which the cause lists of the Judicial Commissioner's Court should be arranged, an important fact is that the dual system does not obtain in the profession at Karachi, and that a system of partnership between members of the profession is, to some extent, in force. We understand that the system by which many cases are put down for each day and adjournments are easily obtained is supposed to have advantages from the point of view of a practitioner, who is liable to have a case or cases in each of several courts. We think, however, that the system whereby witnesses are constantly called to Court in vain, and are repeatedly discharged and re-summoned—a system whereby the adjournment of a case may involve the loss of many weeks—should be abolished altogether in the interests of the public no less than of the litigant and the Bar. The client, as a rule, will desire to be represented by the senior member of a given firm, but all firms will, under any system, be put in the same position. We believe that, in spite of natural prejudice at so considerable a change, one of the best reforms which could be established in the Court would be an arrangement whereby the Court was regarded as one Court, with one office serving three or four judges; the lists

of cases ready for trial being three or four in number, *e.g.*, commercial suits, rent suits and title suits; the judge or judges put in charge from time to time of particular lists or parts of lists; interlocutory work being done either by all the judges to some extent or by one judge only; no dates of hearing given to anybody except for special reason, *e.g.*, where witnesses have to come from a distance. The endeavour should be to make the Court on its Original Side one well managed city court instead of three or four courts of a mofussil type.

12. In this connection a very desirable reform would be to give to one judge the duty of doing all the execution work, and to abolish all point of contact between the sheristadars of the different judges and execution applications, the execution work being done in the central office of the Court.

13. We see no reason why the principle of summary judgment, by extending the application of Order 37 or otherwise, should not be applied in this Court to all the matters mentioned in clause (*f*) of sub-section (*2*) of section 128 of the Code.

14. We cannot too strongly emphasise the necessity for reorganisation of the ministerial staff, and reconsideration of the requirements as to qualification and of the pay of such officers as the commissioner to take accounts, the nazir and the official receiver. This Committee does not exist for the purpose of criticising the work of individuals, and it may well be that a badly paid officer is doing excellent work. We feel obliged to say, however, that in Karachi there is a very strong consensus of opinion to the effect that the pay and prospects in this Court have not been such as to attract sufficiently capable individuals for some of the posts. We understand that recently there has been a rise in the pay of certain members of the staff. Representatives of the Bar complained to us that the system followed in this Court was too much a system of promoting people from the bottom regardless of their education or qualifications, *e.g.*, clerks were promoted to be interpreters. Criticism was also directed against the copying department—in particular as regards the absence of " comparing clerks."

15. The state of the insolvency jurisdiction of this court has been considered in another place.

16. Lastly it is only fair to say that no substantial improvement can by any possibility be effected until the Court be housed in the new building which is now under construction, but which will not be completed, as we understand, for some little time. We hope that on the opening of the new building every effort will be made on the part of the Court to break away from some of the traditional arrangements upon which we have commented above.

CHAPTER 16.

High Courts, Appellate Side.

1. The practice of the High Courts on their appellate sides in the methods of distribution of work and in office procedure varies very considerably. In Chapters 18 to 28, we deal fully with the appellate and revisional work and in Chapter 34, with the control over the subordinate courts. But there are certain smaller matters to which we would here refer.

2. It appears that in some of the High Courts by a little manipulation counsel and vakils are able to choose the Judge before whom applications for interlocutory orders for transfer or preliminary orders in appellate matters are made, one of the objects being to get them before a judge who is known to be very ready in granting stay of proceedings, issuing rules or admitting appeals. It appears to us necessary that the procedure of the High Courts should be such as to prevent counsel and vakils being able to make this choice at will. At Allahabad where the judges sit daily by rotation for a week at a time to receive applications and admit appeals there is reason to believe that as the roster is prepared some time ahead, counsel and vakils choose the dates when they will make their applications according as one judge or another is sitting in a particular week. In this court too there is no custom by which revisional applications must be filed within a certain time of the order complained upon. In Madras all preliminary matters in respect of applications go before a judge who changes from time to time and who is called the Admission Judge. This arrangement seem to be open to a similar objection. The system in Calcutta divides the work strictly on a territorial group system and the benches only exercise jurisdiction in those matters, which relate to the groups assigned to them.

3. In the Limitation Act no period of limitation is prescribed as to the time within which applications in revision must be brought and cases have come to our notice in which applications for revision have been entertained over a year after the order complained of was made. Very occasionally there may be quite exceptional circumstances which render necessary an application for revision being made long after the order was passed and for that reason we recognise that it is not desirable to prescribe in the Limitation Act any fixed period of limitation. In the Calcutta High Court there is a long-standing practice which might be said to amount to a rule of Court, that no application in revision is entertained after 90 days from the date of the order complained of. We consider that a similar rule of practice is necessary in the other High Courts so as to bar stale applications.

4. In dealing with the subject of revision we show what harm can be done by delay in the disposal of applications, especially in

interlocutory matters. It should be the exception when a rule is granted to call for the records in these cases; any lapse on the part of the applicant in depositing process fee or serving process should be penalised by dismissal of the application and any order that is passed should be communicated to the lower courts at once. A proposal made to us by Babu Bhubaneshwar Prashad Pande, Assistant Registrar, Patna High Court, for preventing delay in the disposal of these applications appears to us to be well worthy of consideration. In his evidence before us he said "Cases in which proceedings have been stayed by orders of the superior courts, or cases in which there are no orders of stay of proceedings but the records have been called away in appeal or revision against interlocutory orders should receive the first attention of the court which issued the orders and should be disposed of with all possible expedition. I would suggest prescribing a special statement of such cases to be submitted to the district judges every month and to the High Court every quarter. It should be the duty of the district judge or of the registrar of the High Court, as the case may be, to arrange for the expeditious disposal of such cases." It appears to us that such statements sent from the court whose proceedings have been stayed for these reasons to the superior court would prevent some of the delays which now take place and in dealing with forms and returns we make proposals accordingly.

5. In some courts it seemed to us that an unnecessarily large number of judgments were reserved. This may have been necessitated in the past by the scarcity of good shorthand writers. It is very important that a wrong tradition should not be allowed to grow up as regards this matter and we are glad to know that in all courts a better practice is becoming established. As a general rule there is little reason why judgment should not be delivered at the close of the arguments. It should be the exception and not the rule to reserve judgment. It militates very strongly against reasonable expedition on the part of Judges if the more cases they try the greater the number of treatises they have to compile during the week-end. This is an unnecessary burden to the judge. To the Bar nothing can be less encouraging than to know that the ultimate decision will be taken by the judge after writing several other judgments setting out and discussing the facts and law of other cases.

The result is too apt to be that the case is determined "on the paper book" and with too little attention to the arguments which are represented only by the pale reflection of the judge's notebook. The practice of constantly reserving judgment is not only disadvantageous; it is feeble. It gives an impression that the court cannot grasp facts or does not know its law or cannot state in a reasonably clear form what it knows. As members of the legal profession have to be able to present and discuss cases, the spectacle of a judge who will rarely undertake to give judgment at the time is peculiarly unimpressive.

We would not have it supposed that reserved judgments mean that judgment is unduly delayed. In Rangoon for example that is certainly not the case. Elsewhere, however, we came across cases—rare cases certainly—in which particular judges had an inordinate number of reserved judgments, some of them very long delayed. In our opinion a judge who has accumulated ten—or anything like ten—reserved judgments ought not to sit in court till he has disposed of them. To argue new cases before him in such circumstances—unless indeed they be free from complication or difficulty—is to address oneself to a mortgaged mind.

6. The registrar of the appellate side of the court has not as a rule any judicial powers. In Patna, however, where no doubt he has often been a senior officer, he has been given the power to admit second appeals for hearing. This, we consider, is a judicial function which should only be exercised by a High Court Judge or Bench. In Madras a single Judge decides after reading an appeal at home whether it should be forthwith admitted or posted for preliminary hearing before two other judges of the court. The admission of civil revision petitions by the registrar in Madras does not appear to us desirable. There are certain judicial and *quasi*-judicial powers which can, however, and should be entrusted to him in all High Courts. We refer again to the question of the registrar and his functions in Chapter 34.

7. The preparation and publication of daily cause lists varies very considerably in different courts. In Karachi there is only a board and no regular cause list. In Calcutta the cause lists are prepared in the office but while on the appellate side they are printed by Government, on the original side they are printed by private arrangement. In Calcutta too they are prepared in time to appear in the principal daily papers which is a considerable convenience to the public. In Madras, Government print the lists. In Allahabad a daily list is prepared in the court but is then sent to the Bar Library and printed at its expense. This is both unreasonable and objectionable. We would suggest that in all cases there be daily cause lists printed on both sides of the court and that the High Court itself should alone be responsible for its contents and publication.

Paper Books.

8. The practice in regard to the extent to which records are printed for use by the judges and advocates varies largely in the different High Courts and to this point we will refer at greater length.

9. In the High Court at Rangoon and in the Judicial Commissioner's courts of Oudh and Karachi, very little is printed at all. In Oudh only records of first appeals of a value of Rs. 10,000 and over are printed and at Karachi in first appeals two typed copies containing the plaint, written statement, depositions and material documents, judgment and decree are prepared in the

office for use of the judges and paid for by the parties. Further printing and copying in these courts only takes place when paper books have to be prepared for appeals going before the Privy Council. In the Central Provinces the local Legislature appears to have taken an extreme view and nothing seems to be printed. This is a practical matter and it seems a pity that it should become a subject of local controversy. The members of the Bar at Nagpur who know the local conditions as to vernaculars and otherwise discussed this matter with us and we think they would have no difficulty in submitting to the court a reasonable and economical suggestion to provide for the proper presentation of cases to the court so as to avoid waste of time, effort and eyesight. We sincerely trust that whether as regards printing or copying they may be able to dissuade all authorities concerned from taking extreme views in either direction.

10. The tendency in recent years has been, in order to save the expense of printing twice, to print the higher valued appeals of over Rs. 10,000 in the Privy Council form. If the case goes to the Privy Council this system reduces the cost and time of preparation to a very considerable extent, though in cases where no appeal is lodged there is extra expense to the parties.

11. The two tabular forms annexed set out, as concisely as possible, what parts of the lower courts' records are printed and typed for the use of High Courts, the system of recovery of costs and the form in which transcripts are prepared.

1.—Paper books in regular first appeals.

Court.	Size—type.	Cost.	Form.
Calcutta (Appellate) .	54×42 em pica 47 lines a page.	Initial deposit to be made by the appellant within two weeks of admission. Rs. 50 for suits valued at Rs. 10,000 and less; Rs. 75 for suits above Rs. 10,000 and up to Rs. 15,000; Rs. 100 for suits of a higher value. If the book will cost Rs. 400 the balance to be deposited within 4 weeks of intimation: and if Rs. 600, within 6 weeks. For paper books costing over Rs. 600 and under Rs. 1,000, Rs. 600 is payable in 6 weeks and the balance in 8 weeks. For paper books costing over Rs. 1,000, Rs. 600 in 6 weeks, Rs. 400 in 12 weeks and the balance in 14 weeks.	All appeals except those under Rs. 5,000 in value and of 20 pages or less (of which 12 copies are typed) are in Privy Council form, 64 copies being printed but without side headings.
Calcutta (Original Side) .	54×42 em pica 47 lines a page.	Prepared by the appellant's attorney, the costs being costs in the appeal.	30 copies are printed but 50 extra copies may be printed by consent of parties and in such case the Privy Council form will be strictly followed. Documents in part III are arranged chronologically, series of correspondence being kept together. Maps are kept separate.
Patna	32×64 em pica in ordinary form and 54×42 em in Privy Council form.	Rs. 16 to be deposited with each list of papers for insertion by the party filing such list. Balance to be paid within 30 days from receipt of intimation or in small probate cases within 14 days.	All suits over Rs. 10,000 except partition suits, and others when both parties agree, are printed in Privy Council form: 70 copies of those in Privy Council or 20 copies of others are printed. In the latter documents are also printed in a separate part except when they are few in number. The book is indexed, and the documents chronologically arranged. Marginal notes are given in Privy Council form paper books but not in others. Maps are kept in a separate packet,

Madras. Appellate and Original.	54×42 em	Initial deposit of Rs. 10 made with memo. of appeal to cover cost of printing the decree, judgment and memo. of appeal. Cost of printing plaint and record is recovered also from party. Translations are not charged for.	In all suits valued over Rs. 10,000 the Privy Council form is used. In others all papers are included in one part. On the original side in special cases the Judge may dispense with a paper book on the supply of one full copy of the record. Documents are arranged in chronological order.
Bombay. Appellate Side	54×42 em . . .	Re. 1 per page for copy of judgment, decree and memo. of appeal. Translations As. 8 per 90 words. Copies of English documents As. 1-6 for 90 words typed.	The memo. of appeal and judgment of lower court only are printed. All the rest is typed, two copies being prepared free of charge.
Bombay. Original Side.	54×42 em pica 47 lines a page.	The attorney prepares the books and the costs of preparation are taxed costs in the appeal (a maximum rate for printing, etc., being fixed by rule).	Printed in a form closely resembling the Privy Council form. 12 copies or more. The appellant's attorney must file two copies in court three days before the hearing date. Documents are arranged as for Privy Council.
Allahabad . . .	54×42 em . . .	Rs. 16 on receipt of record from the lower court. Rest to be paid within 30 days of receipt of intimation of cost.	Printed in Privy Council form. For those over Rs. 10,000, 70 copies are printed and for the rest 20 copies. Contents are as in Privy Council form. Documents are arranged chronologically.
Lahore	54×42 cm. . . .	A deposit of Rs. 100 has to be made on filing the appeal: further printing fees to be paid by the appellant within one month of receipt of notice and advance printing fees due from the respondent must be paid within 10 days of receipt of notice.	20 copies are printed and the book is in seven parts.—(1) the plaint and pleas, (2) the lower court record, (3) local enquiry report, (4) evidence on commission, (5) memo. of appeal, (6) order of admission, (7) parties' names, as given in memo. of appeal. Documents are printed in serial (not chronological) order, first the plaintiff's, then the defendant's. Vernacular documents are transliterated but not translated except at the wish of the party.

2.—Paper books in second and other appeals and in revision cases.

Court.	Nature.	Cost.	Contents.	Remarks.
Calcutta (Appellate) .	2nd appeals over Rs. 50 and under Ch. X of B. T. Act.	Rs. 15 payable by the appellant.	12 copies of the judgments and memo. of appeal are printed.	Documents relied on are typed and supplied to the court and the opposite party by the party using them.
	2nd appeals under 50	*Nil*	Two copies of judgment are typed in office.	Do.
	Misc. 1st appeals .	As in 1st appeals . . .	As in 1st appeal but shortened . . .	Special expedition is given in their preparation.
	Misc. 2nd appeals .	As in 2nd appeals . . .	As in 2nd appeal.	
	Review . .	——	Two typed copies of judgment are supplied by the party.	
	Revision . .	——	The copies of the order and the papers relating to it have to be supplied by the applicant if a rule issues.	
Patna . . .	2nd appeals over Rs. 50.	Rs. 12 from each party. (In analogous appeals exceeding two, a reduced rate of Rs. 8 is charged.)	Twelve copies of the plaint, written statement, judgment and memo. of appeal are printed.	
	2nd appeals under 50.	No charge	Two copies are typed in the court office except where they are to be heard by a single Judge when no paper book is prepared and the High Court file is referred to.	

	Misc. 1st appeals .	As 1st appeals . . .	As in 1st appeals 12 copies are ordinarily printed but 70 copies are made when the record is printed in Privy Council form at the desire of the parties.	The printing is expedited, the list has to be filed in two weeks and estimated cost has to be deposited in three weeks.
	Misc. 2nd appeals in remand.	As 2nd appeals . . .	Ditto as 2nd appeals.	
	Other miscellaneous 2nd appeals.	Ditto . . .	Two typed copies are prepared.	
	L. P. appeals over Rs. 50. L. P. appeals under Rs. 50.	No charge	Two typed copies of judgment and grounds of appeal are made in the court office.	
	Review and Revision	.....	Typed copies and necessary papers are supplied by parties. No paper book is prepared.	
Madras . . .	2nd appeals . .	An initial deposit of Rs. 7 for preparing copy of judgments and decree. Party to pay for anything else printed or translated.	The memo. of appeal, judgment and decree are always printed and unless it is otherwise ordered, the plaint, written statements, issues, orders of remand, B diary and other papers for the printing of which the parties apply.	
	Misc. appeals .	Initial deposit of Rs. 7 for printing memo. of appeal, order appealed against and judgment. Balance of cost of printing and translation has to be paid subsequently on receipt of a bill.	Memo. of appeal, order appealed against, judgment and other papers which the party wishes to use.	If the balance due is not paid the appeal can be struck off.
	Misc. cases . .	Initial deposit of Rs. 5. Balance payable on receipt of a bill.	Table of contents, application or proceeding on which the order appealed against was made, the petition, if any, filed in answer, the decree, or order appealed against, the judgment, the B diary and the memo. of appeal.	If the balance is not paid, the case can be struck off

2.—Paper books in second and other appeals and in revision cases—contd.

Court.	Nature.	Cost.	Contents.	Remarks.
Bombay Appellate .	2nd appeals . .	Rs. 1 per page . . .	The judgment and memo. of appeal only are printed. Typed copies of anything else are supplied by the party using them.	In other miscellaneous appeals and in revision matters nothing is printed.
Allahabad . .	2nd appeals over Rs. 500 and execution cases in which *ad valorem* court fees on over Rs. 500 are paid.	Appellant must pay Rs. 16 within 30 days of admission. Respondent Rs. 10 on appearing. Balance must be paid within 14 days of demand.	Memo. of appeal, judgments and decrees are printed.	
	Other cases . .	*Nil*	Nothing is printed. Two copies of relevant papers are prepared in court for the use of the Judge.	
Lahore . . .	2nd appeals and revisions coming before the Divisional or full Bench.	Appellant pays Rs. 1-10 per cent. of the value of the case up to Rs. 40 maximum, and in unvalued cases Rs. 5 for four pages or less and Rs. 7 for more than 4 pages of print.	(1) Judgment of the first court, (2) Judgment of the appellate court, (3) Decree of the appellate court, (4) Memo of appeal, (5) Order of admission and (6) Parties' names, as given in memo. of appeal are printed. 13 copies are made.	
	Other cases.	....	Nothing is printed.	

12. The rules as to papers which must or may be included in paper books and the consequences of their non-inclusion are set out below.

Calcutta (Appellate Side).

Part I of the paper book of a first appeal must contain the plaint, written statement, examination of parties or agents, any order of injunction, any order of attachment before judgment, the issues, the judgment and decree or order appealed against and the memorandum of appeal and may contain the order sheet, the schedules to the plaint, if any, the depositions of witnesses, the report of the commissioner, if any, with maps and depositions annexed and any other paper other than an exhibit on which the decision of the appeal depends. Any papers which must be included, not in English, must be translated into that language. The appellant must prepared a list (marked List A) of those papers which may be included and which he desires to include in Part I of the book and a list of exhibits (List B) to be included at his own expense in Part III. List A must be filed within one week of the notice issued to him by the deputy registrar and List B within two weeks. An estimate is then prepared. Notice of List B is given to the respondent who within two weeks may put in a list of other papers to be printed at his own expense. He may also apply that omitted documents in the appellant's list shall be printed at appellant's expense and each party may object to the inclusion of a document as unnecessary or irrelevant, in which case the registrar will decide for or against its admission. The registrar and parties *should* endeavour to exclude all non-relevant documents. Documents not admitted in evidence shall not ordinarily be included but may be used at the hearing if typed copies are supplied to the opposite party and the court.

Papers not printed may not be referred to at the hearing of the appeal without special leave of court but the court may refer to them if it considers it necessary for the ends of justice.

Calcutta (Original Side Appeals).

The paper book must consist of two parts which, when convenient, may be bound in one volume with an index at the beginning. Part I contains plaint, written statement, issues, depositions, judgment, decree, memorandum of appeal and cross-objection, if any. Part II contains (1) documentary evidence filed on behalf of the parties arranged in the following order:— (*a*) interrogatories and their answers marked as exhibits, (*b*) correspondence, (*c*) entries in accounts and (*d*) other documents, (2) any document rejected by the appeal court when its rejection is a ground of appeal or cross-objection, (3) such other documents as both the appellant and the respondent consider necessary or as the registrar may direct shall be included, on notice to the parties. The index is prepared by the appellant within a week of filing the memorandum of appeal and sent by him to the respondent for

approval who shall return the same within a week. If not so returned the index shall be treated as approved. If returned and the appellant accepts any alterations made, the index shall be treated as approved as altered. If the appellant does not accept the alterations, he shall within 3 days after its return file the same and take out notice returnable within three days for the settlement of the index before the registrar. The notice with endorsement of service shall be filed on the day of settlement. The registrar shall thereupon settle the index. The appellant prepares the book and must deliver six copies to the registrar within six weeks from the index being approved or settled.

Papers not printed cannot be referred to without the consent of both parties.

Patna.

All papers on which the decision of a first appeal depends must be set out in a list by the appellant to be inserted in the book. These must include the plaint, written statement, issues, judgment and decree and grounds of appeal. The printing of other papers is at the appellant's option. Ordinarily schedules, maps, accounts, leases and receipts need not be entered in the list unless a reference to them is necessary for the decision of the appeal. A notice of the list is served on the respondent (if he has appeared) and he may provide a list of other papers to be printed in his list. Any cross-objection must be included at the respondent's cost. The respondent too may insist on papers being added to appellant's list.

Papers not printed may not be referred to at the hearing of the appeal without special leave of court but the court may refer to them if it considers this necessary for the ends of justice.

Madras (Appellate Side).

The paper book in a first appeal consists of a table of contents with a chronological index of all documents filed in the case, plaint, written statement, issues with judge's notes if any, judgment and decree, grounds of appeal, any order calling for a finding or report, any finding or report and objections thereto, the B diary, and such other papers as the parties desire to have translated. At the time of filing the memorandum of appeal a list of these documents has to be given and the respondent may within one month of receipt of notice of appeal apply to have other documents printed.

After receipt of the records by the lower court both sides may point out other papers to be printed.

There appears to be no rule as to the effect of not printing papers but translation may be made by permission of the court in open court of a paper not previously translated on payment of a special fee.

Madras (Original Side Appeals).

With the memorandum of appeal there must be an application for a copy of the shorthand notes of evidence and for translation

and printing of documents. The papers printed for the appellant consist of the plaint, written statement, issues, judgment, decree, memorandum of appeal, notes of evidence and such other papers as are relevant and necessary for the purposes of the appeal, arranged according to their exhibit marks, if any, and otherwise in a chronological order with an index. The respondent's printed papers consist of memorandum of objections, if any, with relevant proceedings and exhibits not printed by the appellant. After admission of an appeal, however, either party may apply to the court to dispense with printing the whole or any specified part of the record.

There appears to be no rule as to the effect of not printing.

Bombay (Appellate Side).

Except the copies of judgment and memo. of appeal nothing is printed. Documents required to be referred to in first and second appeals are translated in the translator's office but private translations are accepted, and in first appeals the costs of preparing them are costs in the suit. Copies of exhibits in English in first appeal cases must be filed a fortnight before the appeal is heard.

There appears to be no express rule as to the effect of not supplying copies of translations and documents, but if owing to absence of translations an adjournment has to be taken, costs are awarded against the applicant for an adjournment.

Bombay (Original Side Appeals).

The paper book, prepared by the attorney of the appellant, contains:—

Part I.—The pleadings, issues, depositions of witnesses, judgment and decree.

Part II.—The memo. of appeal and cross-objections.

Part III.—Exhibits and documents put in on behalf of the parties, any document rejected by the original court where its rejection is a ground of appeal or cross-objection, and such other documents as the prothonotary may direct.

The prothonotary decides in case of dispute whether any document shall be printed *in extenso* or not. The appellant's attorney is responsible for the preparation of the book but in the event of his default the respondent may be allowed to prepare it.

There appears to be no rule as to the effect of not printing documents.

Allahabad.

In first appeals parties apply for translation, printing of evidence and documents. The paper book contains the memo. of appeal and objection, if any, plaint, written statement, judgment and, if so ordered, a copy of the order sheet and such other papers as the parties may apply to have printed.

In cases where the subject matter of the suit is Rs. 10,000 or upwards no evidence or untranslated document which is not printed can be referred to without special leave of the court, but the court may adjourn a case for allowing a document to be translated or printed.

Lahore.

The record, in first appeals consists of plaint, pleas, the autograph record of the first court as it stands (which will be translated if in Vernacular), any report of a local commissioner, evidence on commission, memo. of appeal, order of admission, and parties' names, as given in the memo. of appeal. On receipt of the record, notice issues to both sides to specify what documentary evidence shall be printed and this is printed at the request of the parties.

The parties are not allowed to refer to any document at the time of hearing, if it is not included in the printed paper book. Reference is allowed to unprinted matter only in the case of maps, and extracts from revenue papers if filed *in extenso*.

13. It will be noticed that while in Bombay very little is printed and even in first appeals paper books consist partly of printed matter and partly of typed copies, in Madras we have the other extreme of having even petty revision matters made the subject of a printed paper book. In Patna too a considerable amount of printing is undertaken.

14. The ordinary rule is that paper books are prepared in the court office, this being the best way of ensuring that they are prepared in proper form so as to avoid the necessity of doing the work all over again when an appeal to the Privy Council is admitted. At the same time on the Original Sides of the Calcutta and Bombay High Courts the paper books are prepared in the attorney's office and in Madras in special cases the judges may on receipt of full typed copies from the parties dispense with the need of a book at all. Whatever else may be done in those provinces which have not hitherto adopted the Privy Council form as the form in which appeals should be prepared, it appears to us desirable that, at any rate, the order in which the various documents are required by the Privy Council rules to be arranged should always be insisted on. There is no better system of arrangement, and it should be followed even where it is not necessary to print each document on a separate page or in a particular manner.

15. Under the Privy Council rules it is the registrar's duty to be satisfied that no unnecessary papers are printed in Privy Council appeals. This rule should apply in the case of all other appeals. The rule of the Privy Council which was made in 1920 is as follows:—

> "The preparation of the record shall be subject to the supervision of the court, and the parties may submit any disputed question arising in connection therewith to the

decision of the court, and the court shall give such directions thereon as the justice of the case may require.

"The registrar, as well as the parties and their legal agents, shall endeavour to exclude from the record all documents (more particularly such as are merely formal), that are not relevant to the subject matter of the appeal, and generally, to reduce the bulk of the record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be copied or printed shall be enumerated in a manuscript list to be transmitted with the record."

It is clear, however, from observations made by the Judicial Committee itself in certain recent cases, that even in Privy Council appeals these rules are not properly obeyed and the duty cast on the court under them has not been effectually discharged. We would specially refer to cases in which the whole of khewats and jamabandis are printed when only one or two entries have to be referred to. We believe that the reason of this failure to comply with the rules is that the registrar is in most High Courts unable to undertake himself the duty of going through the records when the Privy Council paper book is being prepared. Arrangements should be made, if necessary, to insure that other and less important work should be delegated and that the preparation of Privy Council appeals should be regarded as a matter of too great difficulty and importance to be supervised by subordinates except perhaps in some courts by the assistant or deputy registrar.

16. As regards appeals in the High Court itself, the endeavour to exclude unnecessary documents is not, in our opinion, sufficient. Mr. Manuk in his evidence before us at Patna referred to the unsatisfactory results of leaving this work to the juniors on either side in the case. In cases which do not have to be printed for the Privy Council we consider that the registrar should have full jurisdiction to disallow the printing of what he considers unnecessary. To avoid any hardship that might be felt there should be a rule, as there is in second appeals in Calcutta, coinciding as we understand with the Patna custom, that if a vakil considers that any paper not printed is necessary for the argument of his case, he should be at liberty in all appeals to provide at the time of hearing, after serving copies on the opposite party, typed copies of such evidence or documents for the use of the court. We understand that much unnecessary printing has, in the past, been undertaken for want of any such rule as some judges are regarded as unlikely to give permission to read out any thing not contained in the paper book. The object of the paper book is only to give reasonable assistance to the court and it is not justifiable to go to great expense in printing copies of documents which do not require consideration for more than a few moments.

17. We consider that there is no necessity in Madras to print at all in petty revisional matters. Two typed copies of the purely necessary papers should be sufficient. In second appeals it appears to us to be sufficient if the memorandum of appeal and the judgments are printed. Any other document on which the parties rely can, as in Calcutta, be typed and supplied to the court and the opposite party by the party who wishes to use it.

CHAPTER 17.

The Presidency and Rangoon Small Cause Courts.

1. In the three Presidency Towns and in Rangoon there are special small cause courts for trial of money suits up to a value of Rs. 2,000. These courts have also powers in ejectment and distress for rent in certain cases in respect of immovable property within these cities, the annual value of which does not exceed Rs. 2,000. The Act applicable to the three Presidency Towns is the Presidency Small Cause Courts Act (XV of 1882). The Act applying to the City of Rangoon is the Rangoon Small Cause Court Act (Burma Act VII of 1920).

2. In addition to the ordinary work of the small cause court, in recent years, by executive order or by special Acts, more work has been thrown on the chief judges of the courts by their being required to hear certain other classes of cases. Thus in Calcutta under the Calcutta Municipal Act the chief judge is a final court of appeal in the matter of the municipal assessment of premises to rates. In Bombay cases come before it under the present Rent Restriction Act. In Madras questions relating to municipal assessment are brought before the chief judge, who is also appointed by the local Government under section 3 of the Land Acquisition Act as the court for hearing land acquisition cases arising in the city of Madras. In Rangoon part of the time of the chief judge is taken up with certain classes of municipal cases and cases coming under the Temporary Rent Restriction Act.

3. These courts have exclusive jurisdiction in the simpler types of money suits up to Rs. 1,000. Beyond Rs. 1,000 they have concurrent jurisdiction with the High Courts and in Madras with the city civil court also. In the three presidency courts a defendant in a case valued at over Rs. 1,000 has a statutory right to have his case transferred to the High Court (or city civil court in the case of Madras) upon terms as to security for the claim and costs. This right does not exist in Rangoon where there is an appeal to the High Court in these cases. We have commented on the working of this provision as to transfer (section 39 of the Act of 1882) when dealing with the Original Side of the High Courts. The necessity of the provision has been called in question and we have little doubt that the defendant's purpose in the great majority of applications for transfer is the purpose of delay. For this reason we regard a strict interpretation of the section as very necessary, it being clear that the judge will seldom if ever have any materials before him on the defendant's *ex parte* application to entitle him to hold it proved that the application is made solely for delay. Accordingly, we have ventured to insist upon the fact that under the section unless the judge gives a direction dispensing with security, security for claim and costs is an inherent condition of the defendant's right. A special dispensation would

seem to involve special reason. The number of cases actually transferred under section 39 does not in any High Court appear to be great. We see no need to repeal or to amend section 39. If our interpretation be correct it seems to us to be sound so long at least as no right of appeal to the High Court is conferred.

4. In Rangoon where there is an appeal to the High Court in cases over Rs. 1,000 we were informed that the right is exercised in a very substantial proportion of such cases. In the presidency towns a right to apply to the Small Cause Court itself for a " new trial " is conferred by section 38 in the case of contested suits. The section gives power " to alter, set aside or reverse the decree or order " but there appears to be considerable divergence of opinion in the different High Courts as to whether the section is intended to give jurisdiction to the court to entertain in effect an appeal on facts as well as law. In Bombay the right is regarded as equal to a full right of first appeal. In Madras it is not.

5. The value and sufficiency of the right to apply for a new trial have been much commented on before us. Such applications come before what is called a Full Bench. In Calcutta the bench consists of the Chief Judge and the trial judge. In Bombay under a recent rule the bench is constituted by the Chief Judge and consists of at least two judges. In Madras the bench consists of all the three judges (*i.e.*, including the trial judge) or else of the chief judge and the trial judge. The Calcutta practice was defended by one of the learned judges of the small cause court. " The Full Bench always consists of the trying judge and the chief judge. The presence of the former is the principal objection of the critics inasmuch as he will naturally be inclined to support his own decision. In answer it might be said that as the small cause court is not a court of record, and as the judges' notes seldom are, nor are they under the circumstances expected to be, full or exhaustive, his presence on the Full Bench is a check against unwarranted statements as to the happenings in the court below. In his absence there will always be a tendency amongst pleaders to fill up gaps in evidence as the judges' notes are not full and also to give a different colour as to the manner in which evidence was given. I admit that the present system is not perfect, but it is under the circumstances the only workable one." We are clear that the evils of the practice have frequently, if not usually, been exaggerated. In one court as to which we were asked to believe that the chances of an applicant were almost hopeless we satisfied ourselves that this was in no way borne out by the figures. We are not convinced, however, that what is done in Bombay is not practicable elsewhere. Any court exercising appellate powers has itself to blame if it relies on inaccurate statements as to what happened in the court below. The trial court may well be expected to take a reasonable note of evidence or of argument in a really contested matter. As the members of the bench are familiar with the trial work, doing it every day themselves, we think that these objections should not count for much.

The present arrangements in Calcutta and Madras should be made to conform to the Bombay practice. The fact that it is not possible to persuade parties and their pleaders that they have an unbiassed tribunal is of far greater importance than the question of the exact degree of truth that underlies their opinion. The case of suits which are tried at first instance by the chief judge gives rise to special considerations which we deal with below.

6. Section 69 of the Act of 1882 gives a right to the Presidency Small Cause Courts to make a reference to the High Court on points of law when two or more judges differ or when the court entertains doubt upon a point and either party requires a reference to be made. This right is not much availed of. To draft a " case stated " so as to raise accurately a point of law is not an easy matter, and the effect of an attempt is very often to make it plain that the point is not a pure point of law. We were informed by the chief judge in Bombay that the small cause court judges have never felt any trouble in making such references but that as the High Court on its Original Side is constantly dealing with the same class of cases, a reference is very seldom necessary. In the last six years, he thought, only three or four references were made and in one of them the High Court thought the reference unnecessary. The right of reference is in our opinion highly useful. We would rather see it more used than curtailed.

7. The right of revision vested in the High Court is that given by section 115 of the Code. In Calcutta, Presidency Small Cause Court revisions are heard by a single Judge on the Original Side. In Bombay and Madras they are heard on the Appellate Side. In Rangoon a wider right of revision has been conferred on the lines of section 25 of the Provincial Small Cause Courts Act. It is we think true of Calcutta, if not also of other High Courts, that the provisions of section 115 of the Code have been interpreted more strictly and exercised more seldom in the case of the Presidency Small Cause Court than in any other class of cases.

8. There seem to us to be three main questions for consideration as regards the right of a suitor to challenge the decision of the trial judge in a Presidency Small Cause Court.

The first is whether the right to apply for a new trial should be extended to orders in proceedings other than contested suits. The real question is whether it should apply to ejectment proceedings under Chapter VII of the Act of 1882. In our opinion the balance of convenience is in favour of leaving the law as it is.

9. The second question is whether an appeal to the High Court should be substituted for the right given to apply in the court itself for a new trial, in cases over Rs. 1,000. Even if the appeal be heard by a single High Court Judge the addition to the work of the High Court would be very substantial and the delay and expense involved to parties would be very serious. Applications for new trials are at present numerous in spite of

the fact that the delay procured thereby is in no court very great. In Madras the number is such that we were invited to consider whether they should not be made to bear a substantial court-fee. In Bombay the hearing of these applications would appear to give less trouble. In Calcutta they make a large inroad into the time of the Chief Judge. The experience of Rangoon inclines us to believe that even if the proposal were applied only to suits of over Rs. 1,000, the volume of work thrown upon the High Court would be so great as to make the step inadvisable in any of the Presidency towns.

10. This leaves us the more limited suggestion that the right of revision should be enlarged to correspond to section 25 of the Provincial Small Cause Courts Act. We are entirely against the *addition* of such a right to the right given by section 38 to apply for a new trial. We are also opposed to such a right of recourse to the High Court being granted in cases below the value of Rs. 1,000. Having regard to the fact that the plaintiff has his choice of forum and the defendant the right of transfer given by section 39 we are not disposed in the circumstances to recommend the widening of the right of revision. We appreciate that there is room for difference of opinion here according to the view taken as to the capacity of the small cause court judges. We are also aware that it is not unknown for applications under section 115 to fail although they have disclosed grave errors of law. There are, however, no courts in India where finality and expedition count for more in the long run than in these presidency courts. The concealed injustice of dilatory or protracted proceedings in many cases must be weighed against the wrong but unappealable decisions.

11. There remains the special problem of the cases tried by the chief judge himself. In Bombay under the recent rule new trial applications in such cases are sometimes heard when the chief judge is otherwise engaged by a bench of two other judges. We appreciate that the objections to this may be overstated but we are not prepared to recommend this practice as a rule suitable to all these courts. We consider on the whole that the most reasonable if not perhaps the neatest solution of this difficulty is to treat cases tried by the chief judge differently from all other cases and to allow an appeal, only on points of law, to the High Court. The chief judge of a Presidency Small Cause Court is, or should be, engaged solely in trying the cases of highest value or cases in which special difficulty or importance has induced him to try them himself. He is regarded as an officer of greater position than the other judges. If the cases heard by other judges are taken under section 38 before the chief judge sitting with a colleague other than the trying judge, it would put no great strain upon the High Court to hear appeals from his decisions at first instance. An appeal on law only is a more valuable right than the right to apply in revision. Such appeals might well be heard by a single High Court Judge. We desire to discourage the notion that section 25 of the Provincial

Small Cause Courts Act is intended as a right of appeal on law. On the other hand an appeal on facts is not, according to the view taken in Calcutta and Madras, given by the present new trial section (section 38); in small cause cases it is generally somewhat hopeless to expect an appellate court to reverse the trial judge on facts; such an appeal involves additional expense at the appellate stage and imposes the necessity of a fuller record at the trial stage; it also prevents idle appeals being summarily dismissed without notice to the respondent. On such appeals it would be advisable to provide by rule that on giving security to the satisfaction of the court for, or depositing in cash, the total amount decreed a stay of execution should follow in the case of all money decrees and that no stay of such decrees should be granted on any other terms. It would not be necessary to interfere with the right of transfer under section 39.

12. The following statement shows roughly the size and the work of the four courts:—

Courts.	No. of judges.	No. of cases for disposal in 1922.	No. of cases instituted in 1922.	No. of cases disposed of in 1922.
Calcutta . . .	7	29,590	22,926	24,895
Bombay . . .	6	33,071	28,451	27,553
Madras	3	18,459	15,942	15,352
Rangoon . . .	2	9,563	8,287	7,924

An examination of the cause lists, in all four courts shows that too many cases are placed on the daily lists and that a large number of unnecessary adjournments is the inevitable consequence. The suitors and the public have grave reason for complaint and the complaint has frequently been voiced by Chambers of Commerce and other public bodies. When the mass of work to be handled is large and the cases such that they should be dealt with promptly, method is essential; but the question whether a sufficient number of judges are employed to do it is the first question. Justice is one thing, economy is another and taxation is a third. No methods can be recommended for a Presidency Small Cause Court save those which will enable a sufficient court to keep abreast of its work. A court chronically in arrears will require entirely different methods because the methods will have different objects.

13. The main features of procedure which affect the matter are those which bear upon the possibility of separating out contested cases. The work done by the registrar, the requirement that a defendant should enter an appearance if he contests, and the requirement of a written statement are things important for this purpose.

14. Each court has a registrar. Under the Acts he can be given power to try cases upto Rs. 20 in the presidency towns and up to Rs. 50 in Rangoon. He can be empowered also to dispose of undefended suits, of execution matters and of interlocutory applications. In Bombay, apart from dealing with arrests for debt and distress warrant cases, the registrar does no judicial work at all. He is empowered to try contested cases up to Rs. 20 but in fact petty suits, undefended suits, execution matters and other applications are done by the judges. His ministerial duties are said to occupy him fully. In Madras he tries cases up to Rs. 20 but he does not dispose of the undefended cases. He does the execution work. In Calcutta he does not hear any of the petty contested suits. He does the execution work and the *ex parte* cases with some exceptions. The exceptions include suits under Rs. 50 to which the summary procedure is applied and which go directly before a judge. They include also ejectment cases, cases in which minors are concerned and cases in which legal representatives have to be substituted for deceased parties. He does not decide in execution cases of attachment of debts or partnership questions. In Rangoon where the recent Act specially raised the limit of his jurisdiction from Rs. 20 to Rs. 50, he never exercises the power at all. The third judge takes all uncontested cases and all applications for instalments. The registrar however deals with cases in which the defendant confesses judgment.

15. Again, let us look at the arrangements as to giving notice of defence and stating what the defence is. In Calcutta, apart from summary procedure applicable to cases under Rs. 50, the defendant by the summons is required to enter appearance in the court's office and at the same time to file a note of his defence. If he does not enter appearance after being served, the registrar passes an *ex parte* decree. Constantly the defendant enters appearance and takes time to file his defence. Without any one seeing the defence the case is posted before a judge as a defended case. The form says "You will be required to record your pleas at the time of entering appearance." From the records that we have examined we discovered that the defendant generally does not record his pleas at the time of entering appearance. The result is this. In many cases the answer may not amount to contest at all and may not in any way affect the merits of the case. We found a defendant who entered appearance in a case in which he was sued for the price of six sewing machines. The case went to the contested list. His written statement was to the effect that he had purchased six sewing machines at the price stated in the plaint, but that he was a poor man and wished to pay the money in instalments. This of course was not a contest; it was a plea for grace. Nevertheless this case went on to the contested list. As a result of this system no judge can possibly tell when he sees the list of cases whether any particular case is really contested or not.

16. In Madras the uncontested cases are not in any way separated from the others. New cases are posted before a judge and he deals with them first. Where service is not shown he orders fresh summons to issue. He hears the evidence and decrees the uncontested cases. If a new case is contested the judge has to record a plea and if the contest is small the case will be tried and disposed of. Sometimes one adjournment is granted, *e.g.*, for a month and the defendant is ordered to file his pleas within a certain time—say a week. Complaint is made that if the defendant does not file his pleas within the week no notice is taken, but the case comes up again in a month just the same. After the new cases the adjourned cases are dealt with: and among these there may be one or two in which there is no defence.

17. In Rangoon all cases go before the registrar in the first instance but he deals only with cases in which the defendant confesses judgment. Uncontested cases in this court go as we understand to the third judge, whatever the value. The usual process in a contested case is that when the case is sent from the registrar to the judge, the judge is asked for time to file written statement. This is given and another date is fixed for the hearing. The process was thus described to us:

"Firstly he has got to appear before the registrar on the date fixed for hearing. Then the defendant says he wishes to contest the case without giving any ground or reason, and he is told to go to the judge the next day. Then he is asked to file his written statement and after that he applies for extension of time which is usually granted.

Q. How long does it take before getting a decree?

A. About six weeks.

Q. Do you think that is too long?

A. After the filing of the written statement generally the case is fixed for hearing and the time given is about a month.

Q. Is it due to the fact that you cannot get an earlier date from the judge?

A. Yes Sir, that is the case."

18. In the Bombay court there appears to be no system as to entering appearance but there is a rule that in a suit for over Rs. 1,000 in which a party appears by a legal practitioner he shall if so required in writing at any time before the suit is on the board for hearing by any other party, state his defences to the action. If he does not, an adjournment may be ordered at his expense. The chief judge informed us that the parties generally start from their place just a day before the hearing and go to their pleaders on the day of hearing to give instructions. If a suit is reached on the first day, every time you will hear the pleaders getting up and saying "Please give me an adjournment." As regards written statements we were told "Our clerks have instructions to ask counsel to put in a defence, *i.e.*, whether

they deny execution or consideration or something else " " When do they do that?" " In the course of the day." The cause lists accordingly are prepared by distributing the total number of cases in which summonses are returnable for a given day among the judges. " As he has to distribute the cases equally among the judges he takes up the bundle and goes on marking Judge 1, Judge 2, Judge 3, Judge 4. There is a list put up and the cases are taken up in order. When the judge is told by the judicial clerk that it is an admitted matter or there is no contest or something of the sort then the order is broken: otherwise suits are taken up in order just as they are placed in the cause list."

19. Now it is quite manifest that the administrative or executive work of the registrar in each of these four courts must be enormous. We have no hesitation in accepting what we have been told by the learned chief judges of these courts that it is not possible to place more work upon the registrar. In Calcutta the registrar has two assistants; in Madras he has none. In Rangoon much of the work that a registrar can do is given to the junior judge: so long as it is separated out and given as a special work to one officer, the name given to the officer matters little. In the Presidency Courts the works are clogged. They have one or more registrars but the *registrar system* is non-existent or at best rudimentary. The judicial duties of a registrar are not more cheaply performed because they are given to a judge. Nothing should go to a judge unless it needs a judge and is ready for the judge to deal with it. The occasional appointment of an extra judge does a certain amount of good but it is not a substitute for business methods. Given these, an extra judge would be much more useful.

20. In a Presidency Court the number of cases disposed of after a real contest is small when compared with the number of uncontested suits. According to the figures supplied to us in Bombay in 1922 the total number of suits disposed of was 27,553 of which 3,190 were contested. In 1923 the total number was 32,746 of which 3,566 were contested. In Calcutta, during 1923, of the 23,194 cases disposed of 4,534 were decided after contest by the seven judges. It has to be remembered that, in Bombay and Calcutta at least, contested suits are very frequently substantial commercial cases, both important and intricate, and require a careful handling. Such cases are very different from the type of cases which, a few years ago, supplied the bulk of the contested work. With the gradual development of trade and industry and with the oscillations and special difficulties of post-war trade the contested work in the presidency towns is fast changing its character. This was very well explained to us in the memorandum we received from the Bar Library of the Calcutta Small Cause Court and by the chief judge of the Small Cause Court in Bombay. These are the circumstances which make it little short of a calamity that unmanageable lists should be sent up to judges without any proper

sifting and without any sufficient classification. That this has been tolerated is only, we think, because the cases of highest value are in general given to the chief judge, thus introducing to some extent the element of classification. So far as the other judges are concerned we collect from the evidence that the grievance of litigants and witnesses is greater in Calcutta than elsewhere. This is in spite of the fact already pointed out that the rules in Calcutta are better adapted, if strictly adhered to, than the rules of any of the other courts, to enable proper classification of cases to be made. The representative of the Calcutta Marwari Association described to us the daily drama. "There are about 200 or more persons present—one plaintiff with witnesses and defendant or defendants with witnesses. These people who come from their houses with cart loads of books and other documents are put to much inconvenience and the court remains crowded the whole day. Now some of the cases are postponed immediately and very few—about two or three—are then allowed to remain on the board. It is not known as to when a case will be taken up. In some cases parties have to wait for four and a half hours and after all have to go back to their homes disappointed and aggrieved. Again a certain date is fixed up and the same thing happens." Much of the difficulty in Calcutta is caused by the bad and insufficient accommodation afforded by the present building, but all the presidency small cause courts must be regarded as affording, by their working, illustrations of the same lack of method. Until, so far as judicial and quasi-judicial duties are concerned, provision is made effective for a registrar system, the consequences of lack of proper method must continue to fall upon the public. We are far from suggesting that any good would result from a reform in this matter carried out at the expense of the executive or administrative supervision of the bailiffs and other officers of the court.

21. Whatever name be given to the officer and whether any particular court requires one officer or more, the principles to be applied are, in our opinion, as follows:

The rules should require that by a certain time the defendant should enter in the office an appearance and should require the defendant at the same time to indicate his defence in writing. Without a memorandum of the defence no appearance should be accepted. No one supposes that the defendant can be asked to produce an artistic written statement, but in small cause cases he can state that he denies the execution, or the consideration, that he never ordered the goods, that he never received the goods, that the price is wrong and so forth. If any difficulty arises, the defendant can be given by the registrar three or four days extra time. He might be given a further time, if necessary, in a proper case, to file a fuller defence but in no case should the matter be sent for trial to the cause list of any judge until some defence has been filed. Again, all contested petty cases up to the value of Rs. 50 should be within the jurisdiction of the registrar. He should likewise do all execution matters with very few exceptions. Indeed we think that

he should be empowered to do all, with the right to send any special matter before a judge for trial. The main thing, however, is that all uncontested cases, whether by reason of confession of judgment or non-appearance, should be disposed of by him. None of these should, in any circumstances, be allowed to clog the list of a judge trying contested suits. We consider also that the parties who, for any reason require an adjournment of a case, should be discouraged from waiting until the day of hearing, when all the witnesses are present, in order to make their application. Such applications should be made on short notice to the opposite side before the registrar. He should have power to grant adjournments in cases that are not part-heard. Both as regards the registrar and the judge the granting of adjournments should be much restricted. They should seldom be granted for reasons that are not sworn to and when they are granted terms should be imposed much more frequently.

22. It has also been suggested to us that a summary procedure under rules framed under section 128 (*f*) (*i*) of the Code of Civil Procedure, might be employed for disposal of all liquidated claims. We think, however, that if something of this sort is to be done it would be more satisfactory to introduce the provisions of Order XXXVII of the Code which apply only to suits on negotiable instruments. This has been done in Madras.

23. Under the Calcutta rules only cases in which the value does not exceed Rs. 50 can be tried under the summary procedure provided by rule 101. There is considerable saving of time if this procedure be employed, and we see no reason why it should not be employed up to Rs. 200.

24. A suggestion was made to us in Calcutta that at the present time when nearly all the judges are Indian gentlemen the need for interpreting evidence into English by a court interpreter might be dispensed with. In Rangoon it appears that considerable delay is sometimes caused by the necessity for obtaining English translations of Burmese documents. It appears that the learned second judge deals with cases between Rs. 100 and Rs. 500 and in cases before him the parties, if they are Burmese, can file their pleadings and documents in the vernacular without incurring the necessity of obtaining English translations. In cases above that value, however, it has been necessary to incur very considerable delays for the sake of translation. Each court in this matter requires separate consideration in view of the local conditions and we are content to call the attention of the authorities to the question.

25. We are satisfied that great dissatisfaction is created by the manner in which instalment orders are made in Calcutta. Elsewhere there is doubtless some dissatisfaction but it is very marked in the case of Calcutta. Under the Code (Order XX, rule 11) an instalment order must be asked for at the time of the judgment; otherwise the court cannot make such an order save with the plaintiff's consent. In the Limitation Act there is an article (Art. 175) which prescribes six months from the date of the decree for an

application for payment of the amount of the decree by instalments. The Calcutta Small Cause Court, however, appears to have unlimited right of granting instalments at any time and appears to be independent of Article 175. When a decree holder seeks execution he is constantly met by an application for instalments. Even after an instalment order has been made and the judgment-debtor has failed to comply with it, applications for execution can be countered by applications to vary the previous instalment order. Not only so but in cases in which the question of instalments has been fought out before a judge and he has ordered payments by monthly instalments—say of Rs. 60, the debtor, if he has several decrees against him in the small cause court, can apply to the registrar for an order fixing the total amount to be paid by him each month and allocating this among the decree holders. In one case, the particulars of which were sent to us by the Bengal Chamber of Commerce, a plaintiff, who not without dust and heat had obtained an order for Rs. 60 a month from a judge, found that the defendant had obtained stay of execution from the registrar on the terms of depositing Rs. 10. It is not always possible for the court when granting instalment orders to make any really effective enquiry into the defendant's circumstances. Considering that judgment-creditors get so little out of insolvency proceedings we would not, however, suggest that the instalment order system in these courts should be put within the same rigid limits as in ordinary civil courts. In Rangoon the High Court has introduced into the ordinary civil courts the instalment principle. Experience in Calcutta, however, shows that, for whatever reason, it does not work well and, in our opinion, some reasonable limits should be imposed in the interests of decree holders. It seems to us most unreasonable that any court should order a judgment-debt to be paid by instalments that would extend beyond a year or at most 18 months. We think that if no application for an instalment order has been made within six months from the decree no such application should be entertained thereafter. Further where default has been made in the payment of instalments no new application for varying the amount of the instalments should be entertained except as regards such instalments as are payable in future. We further think that not more than one application should, in any case, be made to have the instalments varied. If within these limits a judgment-debtor cannot obtain sufficient protection it will be better for him and better for the public that his affairs should be liquidated either informally by agreement with his creditors or under the Insolvency Law. We have the gravest doubt as to the advisability of continuing a system whereby the court endeavours to protect a debtor against whom six or seven decrees have been passed from the operation of the Insolvency Law. The "administration order," as it is known in England and worked in English County courts under the Bankruptcy Act, is a different matter altogether and if introduced into India would not, in our opinion, work.

26. We had sent to us full particulars of a very striking case in the Calcutta court in which a plaintiff having made a small loan to

the defendant sued him and got judgment *ex parte*. The defendant kept the plaintiff at bay for some six months by making and renewing applications to set the decree aside. We cannot discover that in order to effect this the defendant found it necessary at any time to give evidence on oath.

The entries in the order sheet are worth study, and it is set out below:—

31st July 1923—Decreed *ex parte* before registrar for the full amount claimed with costs and pleader's fee Rs. 989-12-6.

1st August 1923—New trial application filed by the defendant before 5th Bench. Ordered:—Issue notice returnable on 27th August 1923. Stay execution in the meantime.

27th August 1923—Parties with their pleaders present. Defendant ordered to deposit Rs. 200 and on such deposit case to be restored. Adjourned for 2 weeks.

10th September 1923—Parties present. Application adjourned for 2 weeks by consent.

24th September 1923—Plaintiff's pleader present and defendant absent. Application for new trial dismissed for default.

26th September 1923—Defendant again applied for new trial before 5th Bench. Ordered:—Issue notice returnable on 1st October 1923. Stay execution in the meantime.

1st October 1923—Parties with their pleaders present. Defendant ordered to deposit Rs. 200 and on such deposit case to be restored. Defendant to pay to plaintiff half pleader's fee as restoration costs. Adjourned to 26th November 1923 to enable the defendant to deposit money.

26th November 1923—Parties present. Application adjourned for two weeks by consent.

10th December 1923—Parties present. Application adjourned one week on defendant's application to enable him to deposit money. In default application to stand dismissed.

17th December 1923—Parties present. Application adjourned to 22nd December 1923 on defendant's application on the same terms as above.

22nd December 1923—Parties present. Application adjourned to 3rd January 1924 on defendant's application on the same terms as above.

3rd January 1924—Plaintiff's pleader Babu H. K. Chatterjee present. Defendant absent. Application dismissed for default with half pleader's fee Rs. 22-8-0 certified to plaintiff.

Instances such as this when drawn to our attention were investigated for us by the learned chief judge who gave us great assistance on all points of practice connected with the court. We think that the court should in all cases require deposit of or security for the decretal amount as a condition of applications whether for new trials or to set aside *ex parte* decrees. This is the provincial practice in small cause courts as regards *ex parte* decrees.

27. In Bombay considerable evidence was put before us in favour of giving jurisdiction to the Bombay Small Cause Court not only in mortgage suits but also in certain smaller partnership and other cases. This proposal has arisen not so much from any desire to treat these cases as small cause cases, as from the fact that there has been a block in the work of the Original Side of the High Court; accordingly the Bombay Small Cause Court with its new and ample buildings is thought to be the best court for these smaller cases. We have referred to this when dealing with the original jurisdiction of the High Court of Bombay.

28. Another suggestion made to us in Bombay is that in view of the rise in rental values there the jurisdiction in cases of ejectment and distress should be raised from its present limit of an annual value of Rs. 2,000 to an annual value of Rs. 5,000. We do not, however, consider that there is any general need to raise this jurisdiction. So far as Calcutta is concerned it would be impossible without a larger building to add any jurisdiction which would require an increase in the number of judges.

29. We would refer here to what has been said in Chapter 7 of this report in connection with Articles 20 and 21 of the second Schedule of the Provincial Small Cause Courts Act. We think that clause (*s*) of section 19 of the Presidency Act should be modified so as to permit in the case of movables of suits of the character described in Order 21, rule 63 of the Code and suits to set aside attachment being brought in the small cause court.

CHAPTER 18.

Appeals.

Introductory.

For fifty years and more the multiplicity of appeals in India has engaged the attention of Government and the High Courts.

2. The object of litigation is the ascertainment and enforcement of rights—in other words a decision which can take effect with finality. If the time taken to arrive at such a decision is unduly long, the fact that several intermediate and inconclusive opinions have been delivered during the progress of a case through different courts, is of small consolation to the parties. It is idle to concern ourselves with the means of preventing delay at each stage of a case if we ignore the more important question of the number of stages through which a case should be allowed to pass. Nearly all the evil consequences of delay in the final disposal of a cause attach to the delay which is occasioned by a series of appeals. The bad feeling engendered, the expense incurred, the interruption of business, the uncertainty, the opportunities of tiring out the poorer or the weaker party—these are all present in full force. Some of these increase in evil as the case goes higher, since the superior courts are in general more expensive and more remote. In any case the longer final decision is postponed the greater is the likelihood meanwhile of incidental disputes or interlocutory business arising to clog the progress of the case. Deaths of parties may involve fresh delays, changes in the property or the circumstances may involve questions of management; new opportunities of dispute may be seen arising from the main dispute in all directions. If, as is not infrequently the case, the litigation is the product of bad feeling, or is speculative litigation—aiming at the wresting of a compromise by legalised oppression—the opportunities will not readily be allowed to slip.

3. So far we have said nothing of the cost to the State—chiefly because we consider—and we are anxious that this should not be obscured—that the main interest of the State is not in the question of cost but in having disputes quieted and rights ascertained in an effective and business-like manner. But the question of cost is a part of the question. Our present system as to "Special" or "Second" appeals is moulded by considerations of cost, and it is fair matter of opinion whether any proposal to restrict them which could not be justified on other grounds would have or would deserve much chance on the plea of cost.

4. Still it is well worth-while to recall what Lord Hobhouse wrote in September 1872:

"In considering what limit should be assigned to the power of appealing, our leading maxim is that it is the interest of the

commonwealth to have an end of law suits. No man has a right to unlimited draughts on the time and money of the public in order to get his private affairs settled as he wishes. The State's duty is discharged when it has provided such a reasonable amount of attention and skill and honesty as will satisfy reasonable men that their causes have been decided, erroneously or otherwise, on the merits and according to the best ability of the judge, and so will prevent them from feeling that resentment of sheer injustice which drives people to take the law into their own hands and to wage private war. Upon this principle all laws place some limits to litigation and so have we placed limits to the power of appealing."

5. The question whether in certain cases a greater degree of finality can safely be given to decisions of the lower courts is not only one of much practical difficulty but is one in which genuine public feeling and even perhaps vague public opinion must count heavily. So far from ignoring this, we think that it lays upon us, in making our recommendations, the duty of great caution. But it lays another burden upon us—to exhibit the real nature and scope of a problem that has been too frequently discussed in abstraction if not in vacuo; or as if a general and a priori objection to any curtailment of " rights " of appeal were a noble sentiment. After all, even if law were an exact science and if truth could always be discovered by a sufficient scrutiny of conflicting evidence —even then " exactness " would not be the whole of justice. The phrase " Right of Appeal " is itself deceptive; there is no right in *A*, without a corresponding liability in *B*, to be taken on appeal, and the objection to " excluding the poor man from the High Court " would seem to vary somewhat in value according as the poor man is appellant or respondent. The " right of appeal " favours the longer, not the shorter purse; favours parties—be they few or many—who love litigation; who bring or defend cases for purposes of spite and oppression; it favours also the defendant who merely hopes to put off an evil day. The question is not whether a person who has lost his case will not in general regard it as a privilege to have the option of challenging the result in another court. He certainly will, and the oftener the case has been tried already the more may the costs dispose him to appeal. Nor is the question merely how to prevent frivolous appeals, unless of course one takes the view that the lower courts are utterly incompetent to decide anything that really needs deciding. (It is quite easy for the most difficult points of law or fact to arise in a Small Cause suit on a promissory note for a hundred rupees.)

6. The litigant in India is very frequently incapable altogether of judging as to the merits of his suit, apart from any technical points that may be involved. The assumption that there is a right solution to every case and that a trained officer exercising reasonable care can and will in general decide it rightly is not a received assumption. In its absence litigation very readily becomes a gamble and a miserable nuisance. Facility of appeal allowed in the

past is largely responsible for this attitude of mind; for the alleged "want of confidence" in any court so long as there is a higher court; for the notion that there is a loss of 'Izzat' by failing to appeal, and that to proceed from court to court is the right of any losing party. We have been informed by many witnesses—by lawyers chiefly but by others also—that any curtailment of any right of appeal would be felt by the public as a grievance. If this be the prevailing view, it is a convincing proof of the evil of the present system and but emphasises the desirability of doing whatever may be possible to prevent unnecessary appeals. As Lord Hobhouse put it "We have never systematically limited the number of appeals which the suitor may bring except by not providing him with more courts to appeal to. Whatever courts there are he may run through the whole series of them."

CHAPTER 19.

Appeals. The present system.

1. Differences of detail and nomenclature in the different provinces make it difficult to give a general view of our present legal system. If, however, we resolutely ignore special features and cling strictly to that which is typical or usual*, we see at once *firstly* that the structure of our legal system is entirely conditioned by the valuation of suits for purposes of jurisdiction, and *secondly*, that as regards two very different classes of case the law, proceeding on the valuation principle, has made a strictly business like provision (in theory) for attaining final decision.

If a case from its mere value must be regarded as of the most important class, it is tried at first instance by an officer of rank not lower than a subordinate judge (in the Bengal sense of the term) and the appeal lies direct to the High Court on fact and law. The value which entitles a suit to this procedure is Rs. 5,000 but the first appeals before a High Court include some Probate cases and other special matters. The table here given shows the volume of this work.

Table showing number of first appeals to High Courts in 1922 against decrees of subordinate courts in original suits with figures of decisions and arrears.

Province.	Total number of appeals before courts.	Number of appeals decided.	Number of appeals undecided at the end of the year.
Bengal including Assam	784	308	482
Bihar and Orissa	1,033	288	745
Madras	1,507	372	1,135
Bombay	951	366	585
Sind	191	65	126
Agra	1,577	561	1,016
Oudh	254	127	127
Punjab	1,198	234	964
North-West Frontier Province	61	20	41
Burma	686	328	358
Central Provinces and Berar	402	164	238
Coorg	6	2	4
TOTAL	8,650	2,835	5,821

* Thus for simplicity we take Rs. 500 as the limit of Small Cause Court jurisdiction.

The courts are, as will be seen, terribly in arrears with this work; speaking generally it takes two years at least for a first appeal to be heard and very often three years.

2. A general view of the fate of these first appeals before the High Courts, etc., may be given.

Statement shewing disposal of first appeals by High Courts from decrees of subordinate courts in the year 1922.

1	2	3	4	5	6	7	8
Name of Court.	Decided.	Decree upheld.	Percentage of 3 to 2.	Decree modified or case remanded.	Percentage of 5 to 2.	Decree reversed.	Percentage of 7 to 2.
Bengal and Assam .	302	210	69·53	7	18·88	35	11·59
Bihar and Orissa .	288	207	71·87	48	16·66	33	11·45
Madras . . .	372	232	62·36	75	20·10	65	17·47
Bombay . .	366	257	70 22	39	10·66	70	19·12
Sind . . .	65	40	61·53	8	12·30	17	6·15
Agra . . .	561	416	74·15	54	9·62	91	16·22
Oudh . . .	127	91	71·65	16	12·60	20	15·75
Punjab . . .	234	166	70·94	47	20·51	21	8·55
North-West Frontier Province.	20	11	55·00	8	40·00	1	5·00
Burma . . .	328	213	64·94	40	12·20	75	22·86
Central Provinces .	164	97	59·01	36	21·95	31	19·04
Coorg . . .	2	1	..	1	..	..	..
TOTAL .	2,829	1,941	68·61	429	15·16	459	16·23

There is a limited and guarded right to appeal to the Privy Council—a right effective enough in cases valued at Rs. 10,000 or more. One may on this recall the opinion of Sir J. Stephen in his minute of February 1872.

"With regard to the special question of appeals to the Judicial Committee I have only to add that it appears to me that they stultify appeals to the High Court. I know of no instance in which a double appeal can be justified—I think that appeals should

either go straight to the Privy Council from the court of first instance or should be in the shape of cases reserved for the opinion of the court above upon facts found by the court below."

But notwithstanding the great respect which such an opinion must command we are satisfied that double appeals are both proper and necessary in some important cases and that guarded and conditioned as at present, they are justifiable in principle, in practice necessary as a control over the different (and differing) High Courts, and a source of strength to our judicial system with the instructed and uninstructed public.

The work done for India by the Judicial Committee may be seen from the following table:—

Privy Council appeals, 1922.

—	Pending at commencement of year.	Institutions.	TOTAL.	Disposed of without hearing.	Confirmed.	Varied.	Reversed.	Total disposed of.	Pending at close of year.
Bengal	24	15	39	3	6	..	5	14	25
Bihar and Orissa	21	5	26	..	8	..	4	12	14
Madras	29	8	37	2	8	2	8	20	17
Bombay	10	17	27	..	2	..	2	4	23
Agra	12	10	22	3	6	..	2	11	11
Oudh	14	6	20	3	5	..	2	10	10
Sind	2	..	2	..	1	..	..	1	1
Punjab	5	8	13	1	2	..	4	7	6
Burma	4	7	11	..	1	..	1	2	9
Central Provinces	2	5	7	..	..	..	1	1	6
TOTAL	123	81	204	12	39	2	29	82	122

Changes will certainly come in time* but we see nothing here calling for a curtailment of appeals. The Judicial Committee has been known to complain in cases where the High Court has disposed of an appeal on one point and omitted to discuss the others. In such cases if the other points become material the Judicial Committee are in the position of a court of first appeal which, in Indian cases, is not their real function. So far as "big cases" are concerned we are of opinion that the system of appeals is quite businesslike.

4. So too with our method of dealing with small claims to money or movables. If the value of a suit is not more than Rs. 500 and

* We do not think that we can usefully discuss the question of a Supreme Court for India or the project of a single court of ultimate appeal for the whole empire.

is in form (to speak roughly) a simple suit for money or movables, the law intends and (in theory) provides for its trial in a summary fashion, without right of appeal, before a judge of one of the lower courts to whom Small Cause Court powers have been given. It is true that the High Court has the widest right of interference on revision, but it has also the power to guard against abuse by requiring a proper case to be established for the granting of a rule. It is true also that such a case may have to be tried as a regular suit; in this event there is one appeal on fact and law to an officer of the rank of subordinate judge or district judge, and any further appeal is barred, though the limited form of revision provided by section 115 of the Code overhangs the proceeding. We deal elsewhere with the question whether Small Cause Court procedure can safely be made applicable to cases at present excluded from it either by value or by the nature of the dispute and with other incidental questions. We will deal later with section 115 of the Code. For the moment we would point out that in the Small Cause Court procedure our law makes an elaborate and, so far as it goes, a successful attempt to accommodate " the old war between exactness and despatch." It runs the risk, no doubt, of the High Courts being flooded with applications in revision under section 25 of the Provincial Small Cause Courts Act (IX of 1887) but we have no reason to think that in any province this is an unmanageable evil or that there is any case for an alteration of the section. There is, as we shall see, room for improvement in the method of handling such revisions so far as some High Courts are concerned.

5. It is when we come to the intermediate types of case that we cannot fail to be struck both with the ill-success of present methods and with the difficulty of reform. We are dealing here with two main classes (1) cases of the Small Cause Court type but between the Small Cause Court limit (Rs. 500) and Rs. 5,000 and (2) cases which are of one or other of the kinds described in the second schedule to the Provincial Small Cause Courts Act. The first class presents fewer difficulties. But cases of the second class may be of any value below Rs. 5,000. In all these cases there is a regular trial after settlement of issues and an appeal on fact and law to an officer not below the rank of a subordinate judge. The findings of fact of the appellate judge who has not seen the witnesses are made final (except in Burma) whether he agrees with the trial judge or not, but a second appeal on points of law is given to the High Court. (In the Punjab where customary law prevails a finding as to the custom is not appealable except by leave of the District Court). When a second appeal is brought the pleader for the appellant is heard (if necessary) under Order XLI, rule 11, which gives the court power to dismiss it without troubling the respondent. The rule has no special applicability to second appeals and it in no way ties the hand of the court as to the conditions under which such summary dismissal may take place. Its main use is to get rid of frivolous appeals including appeals which are entirely concluded by the findings of fact of the lower appellate court. But in different

hands it is used with very different strictness, and skill in the drawing up of the grounds of appeal or in the presentation of the appellant's case goes a long way to make out " a point of law " good enough to evade the rule though destined afterwards to fail miserably. In practice some judges appear to require the appellant to show a point of law not so manifestly bad as to be unarguable, while others insist on a *primâ facie* good point of law. For the purpose of an *ex parte* argument neither standard is very high. The general view, we think, comes to this:—that the appellant has a certain right of appeal and the question is—is he abusing that right? Even so, however, of the appeals that are filed, a large proportion are dismissed at this stage though the ultimate fate of those appeals which survive this stage shows that in most provinces Order XLI, rule 11, does not adequately protect respondents.

6. When a second appeal comes on for final hearing most of the difficulty is created by the distinction between fact and law. For the present purpose the difficulty which matters is that any error, mis-exposition or incompleteness in the judgment under appeal is dangerously apt to lead to a remand independently of the ultimate merits of the case. Since 1908 the court has had power to decide a question of fact not determined by the lower court. But if there is a finding of fact and there is any ground whatsoever for taking exception to a piece of evidence admitted or if the judge's attempt to state the exact form of the question of fact is not completely successful the court on second appeal is in great difficulty in determining for itself whether the error is one that really matters. Here we may refer to such a case as Umesh Chander Chatterjee *vs.* Chandi Charan Roy Chatterjee, I. L. R. 7 Cal., 293, which subject to section 103 of the Code, is still, we believe, regarded as good law. Whether section 167 of the Evidence Act can in theory be applied at all in second appeal is a question. How to read Order XLI, rule 25, with Order XLI, rule 1, is another. But in any case the manner in which second appeals come before the court will frequently prevent the court from going through all the evidence to settle for itself such questions of fact. The appellant's whole object in many cases is to get a remand; this gives him another chance upon the facts and very frequently a change of judge. The evil of a remand at so late a stage is almost intolerable in small cases, but the evil is made worse by the fact that not infrequently an order on remand is itself attacked in second appeal.

7. The process, however, has not even yet, particularly in cases of small value, come to an end, because in most High Courts many second appeals are heard by a single Judge and there remains the Letters Patent appeal from any judgment of a single Judge. Letters Patent appeals are scrutinised by two Judges under Order XLI, rule 11, and if not summarily dismissed are ultimately heard by two Judges as contested appeals. One would like to think that the result at this stage was never a remand. Unfortunately this sometimes has to be and is.

8. Looking at this long drawn process somewhat more narrowly we find that the position of the first appeals before the District Courts is as under:—

Table showing number of first appeals in 1922 to District Courts against decrees in original suits with figures of decisions and arrears.

FIRST APPEALS.

Province.	Total number of appeals before Courts.	Number of appeals decided.	Number of appeals undecided at end of year.
Bengal	34,577	19,531	15,046
Assam	1,530	983	547
Bihar and Orissa	14,627	8,451	6,176
Madras	22,998	10,943	12,055
Coorg	36	31	5
Bombay	9,292	4,287	5,005
Sind	637	232	405
Agra	14,859	9,026	5,833
Oudh	2,817	1,691	1,126
Punjab	16,855	11,278	5,577
Delhi	732	545	187
North West Frontier Province	1,727	1,325	402
Burma	4,650	3,884	766
Central Provinces and Berar	4,983	3,788	1,195
TOTAL	130,320	75,995	54,325

Broadly speaking such an appeal will take a year to come on for hearing.

A few provinces give the number of cases in which an appeal lay as well as the number of appeals brought:—

	Number of appeals instituted in 1922.	Number of appealable decisions in 1922.	Percentage of appeals to appealable decisions.
Bengal	13,830	51,706	26·74
Assam	977	3,245	30·10
Bihar and Orissa	8,703	24,330	35·77

The proportion of appealable cases that are, in fact, taken on appeal would seem to be roughly one third and in some other provinces it would seem to be even more.

The number of first appeals summarily dismissed by the District Courts without calling the respondent is practically negligible. In the provinces of Bombay and Punjab a certain number aggregating 8·23 and 4 per cent. respectively were so dealt with in 1922

but in none of the other provinces except possibly in Burma (for which we are unable to get separate returns) do the number of such dismissals anywhere approach one per cent. It occasionally happens that appeals even on points of fact are brought quite idly and solely to obtain delay and especially is this to be expected in the case of appeals in execution proceedings. It is by no means always improper or impracticable for the district courts to dismiss appeals *ex parte* under Order XLI, rule 11, but of course the great mass of such appeals must remain outside the scope of the rule.

9. The volume of work represented by "second appeals" is seen from the following table which explains why it is that generally speaking there is a delay at this stage of about two years:—

Table showing number of appeals in 1922 against appellate decrees (other than appellate decrees of Judges of the High Court) in High Courts and the Courts of Judicial Commissioners, with figures of decision and arrears.

SECOND A

Province.	Total number of second appeals before courts.	Number of appeals decided.	Number of appeals undecided at close of year.
Bengal including Assam	8,028	3,548	4,480
Bihar and Orissa	3,768	1,465	2,303
Madras	3,517	1,066	2,451
Bombay	1,136	612	524
Sind	90	39	51
Agra	3,900	2,098	1,802
Oudh	505	296	209
Punjab	3,643	2,365	1,278
North-West Frontier Province	125	67	58
Burma	1,572	1,065	507
Central Provinces and Berar	2,084	943	1,141
TOTAL	28,368	13,564	14,804

10. To know the fate of these "second appeals" it is necessary to see what proportion are summarily dismissed under Order XLI, rule 11, and then to ask what happened to the rest. The real comparison should of course be between the total number of appeals considered under Order XLI, rule 11 (whether formally posted for hearing or not) and the number of cases summarily dismissed. The former figure is not available from the reports but as all second appeals are presumably examined under rule 11, within a short time of being presented, a comparison between the number of appeals instituted in the year and the number summarily dismissed

will be the fairest comparison possible. In any case, the following table gives the facts sufficiently:—

SECOND APPEALS, 1922.

Province.	Second appeals instituted.	Dismissed Under O. 41, r. 11.	Dismissed for default.	Decided after hearing.	Total number of decisions.
Bengal including Assam	2,692	1,178	281	2,089	3,548
Bihar and Orissa	1,580	480	55	930	1,465
Madras	1,831	362	15	689	1,066
Bombay	727	289	3	320	612
Sind	37	8	1	30	39
Agra	figures not available.	649	35	1,414	2,098
Oudh	392	65	23	208	296
Punjab	2,255	1,396	58	911	2,365
North-West Frontier Province	figures not available.	23	2	42	67
Burma	357	252	(including dismissal for default).	813	1,065
Central Provinces	1,159	237	45	661	943
TOTAL	..	4,939	518	8,107	13,564

The cases which were not summarily dismissed but came on for hearing after notice to the respondents as contested appeals were disposed of as under:—

Province.	No. decided after admission under O. 41, r. 11.	No. in which decree was upheld in entirety.	Percentage of Col. 3 to 2.	No. in which decree was notified.	Percentage of Col. 5 to 2.	No. in which hearing was remanded to Lower Court.	Percentage of Col. 7 to 2.	No. in which decree was reversed.	Percentage of Col. 9 to 2.
1	2	3	4	5	6	7	8	9	10
Bengal including Assam.	2,089	1,616	77·36	53	2·54	192	9·19	228	10·91
Bihar and Orissa	930	589	63·33	33	3·54	167	17·95	141	15·16
Madras	689	486	70·53	116	16·83	7	1·01	80	11·61
Bombay	320	231	72·18	19	5·93	5	1·56	65	20·31
Sind	30	19	63·34	..	..	1	3·33	10	33·33
Agra	1,414	1,050	74·25	77	5·44	57	4·03	230	16·26
Oudh	208	137	65·86	9	4·32	8	3·84	54	25·96
Punjab	911	558	61·25	55	6·04	96	10·54	202	22·17
North-West Frontier Province.	42	31	73·81	4	9·52	1	2·38	6	14·29
Burma	813	478	58·79	40	4·92	7	·86	288	35·43
Central Provinces and Berar.	601	433	65·20	37	5·59	118	17·85	75	11·34
TOTAL	8,107	5,628	69·40	443	5·46	659	8·14	1 9	17

These figures are not a little remarkable, especially when it is remembered that in the great majority of cases a second appeal, if not summarily dismissed, takes two years.

The mass of cases summarily dismissed represent a considerable loss of time and money, but apart from that, out of 8,107 second appeals decided on contest in India in 1922, the decrees appealed from were in 5,625 cases upheld in their entirety. The percentage of complete success for the whole of India in appeals decided otherwise than under Order XLI, rule 11, was 17; in Bengal and Madras it was 10·91 and 11·61 respectively.

11. It is not easy to show succinctly how many of the second appeals before our High Courts are valued at a very low figure for purposes of jurisdiction. In Patna we are informed that out of 1,393 appeals preferred in 1923 no less than 1,189 were of a valuation not exceeding Rs. 500. In Allahabad out of 1,877 second appeals brought in 1923 no less than 1,138 were under Rs. 500 (of which 845 were under Rs. 250, 509 of these being under Rs. 100). In Madras out of 1,899 second appeals in 1923 of which 94 were incapable of valuation only 230 were valued at more than Rs. 1,000.

Let us take Calcutta in more detail. We find that out of 2,705 second appeals brought in 1922 (including 13 revised), the values were as follows:—

Under	Rs. 10	148	appeals:
	Rs. 50	599	,,
	Rs. 100	323	,,
	Rs. 500	564	,,
	Rs. 1,000	125	,,
	Rs. 5,000	179	,,

767 appeals were of a value not denotable in money—the great bulk (740) being under various sections of the Bengal Tenancy Act.

If one accepts the rough division into Title, Rent and Money suits the classification was as follows:—

Classification of Second Appeals of 1922 of the following values under three different heads.

—	Rs. 50 and below.	Exceeding Rs. 50 but not exceeding Rs. 100.	Exceeding Rs. 100 but not exceeding Rs. 150.	Exceeding Rs. 150 but not exceeding Rs. 200.	Exceeding Rs. 200 but not exceeding Rs. 250.	Exceeding Rs 250 but not exceeding Rs. 300.	Exceeding Rs. 300 but not exceeding Rs. 400.	Exceeding Rs. 400 but not exceeding Rs. 500.
Title suits . . .	419	222	109	82	48	40	51	40
Rent suits . . .	320	93	52	31	17	14	15	5
Money suits . . .	8	8	11	8	8	8	12	13

Putting aside the unvalued cases and also the rent and money suits let us look at the number, value and character of the smallest Second Appeals which are roughly classed as "Title Suits."

Classification of the valued title suits in Second Appeals of 1922 up to Rs. 250 in value.

Nature of suits.	Rs. 50 and below.	Exceeding Rs. 50 but not exceeding Rs. 100.	Exceeding Rs. 100 but not exceeding Rs. 150.	Exceeding Rs. 150 but not exceeding Rs. 200.	Exceeding Rs. 200 but not exceeding Rs. 250.
Suit for possession . .	166	88	40	33	19
Suit for establishment of title.	111	62	27	24	15
Suit for declaration of title	78	41	23	12	7
Suit on mortgage bond .	..	3	3	4	1
Partition suit . . .	1	1	6	4	1
Ejectment suit . . .	46	11	4	3	1
Suit for assessment . .	4	2	..	..	..
Suit for injunction . .	2	3	1	..	1
Suit for specific performance of contract.	..	2	..	1	2
Suit for restitution of conjugal rights.	4	2	..	..	..
Suit for dissolution of marriage.	..	..	1	..	..
Suit for setting aside documents.	1	1	1	1	..
Suit for setting aside decrees.	1	2	1	..	1
Suit for sale . . .	..	..	1	..	..
Suit for redemption of mortgage.	1	3	..	..	..
Suit on tort . . .	..	..	1	..	..
Suit for settlement of boundaries.	3	..	..	..	..
Suit for setting aside a sale	1	1	..	..	..
TOTAL .	419	222	109	82	48

NOTE.—Number of valued Second Appeals of 1922 up to Rs. 500 in value dismissed under Order XLI. rule 11, C. P. C. = 672.

In this court (Calcutta) the year 1922 commenced with 5,326 second appeals for disposal. Institutions during the year brought this figure up to 8,028. In one way or another 3,548 were disposed of during the year of which 1,178 were summarily dismissed under Order XLI, rule 11, including 672 valued at under Rs. 500. At the end of the year the number of second appeals pending was 4,480 and the average number of days for which the appeals were pending is given as about 620.

12. It has been pointed out already that the decision of a Letters Patent appeal is not necessarily the end of the case. The figures for such appeals include those appeals which arise from a difference of opinion between the Judges sitting together as a Division Bench but the great majority are appeals from a single Judge hearing second appeals. The delay that takes place at this stage can be seen from the last table printed at the end of this Chapter.

13. Lastly there remain miscellaneous appeals both before the High Courts and before the district courts. These appeals arise out of orders which may issue either in pending suits or in execution proceedings and any delay in dealing with them results in delay in the disposal of the suits or proceedings to which they relate.

No figures are available to show what proportion of these appeals relate to orders in pending suits and what to orders in execution. They include appeals against orders of munsifs and subordinate judges to the district courts in matters involving Rs. 5,000 and less, and first and second appeals to the High Courts in suits over the value of Rs. 5,000 in first appeals, and against orders of the district and subordinate judges' courts in a certain number of other matters in second appeals. The number of such second appeals cannot be exactly estimated but it would appear to have been rather more than 1,000 in the year 1922 for the whole of India. The main cases therefore in miscellaneous matters are first appeals. Two statements are appended herewith showing the number of such appeals before the High Courts and district courts with the results and it will be noticed that the actual measure of success or partial success in these appeals is roughly speaking only 30 per cent. both in the High Courts and in the district courts. The average duration given for these appeals varies largely in the different provinces, in the High Courts varying according to the returns from 697 days per contested case in Sind to 100 days per case in Oudh and in district courts from 443 days in Sind per contested case to 74 days in the Punjab and 56 in the North-West Frontier Province. We do not at this stage make any proposals as to the reduction of these appeals but would only reiterate that delay in the disposal of these appeals (which will be seen from the table to be altogether excessive) results in delay in the final disposal of the suits and proceedings to which they relate in the trial courts. The number of such miscellaneous appeals does not appear to be excessive, the total number being only 17,700 whereas

the number of contested suits tried in 1922 was 456,334, *i.e.*, the total percentage of miscellaneous appeals to contested suits is less than 4 per cent. Nevertheless, we believe that, of the appeals brought, a large number are intended purely for purposes of obstruction and delay.

Statement showing Miscellaneous Appeals before High Courts—1922.

Province.	1st appeals.	2nd appeals.	Total omitting transfer.	Summarily rejected.	Dismissed in default.	Confirmed.	Modified.	Remanded.	Reversed.	Disposed of total.	Pending.	Average duration.	Percentage of 5 & 6 to 11.	Percentage of 7 to 11.	Percentage of 8 & 9 to 11.	Percentage of 10 to 11.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Bengal and Assam .	490	324	823	113	64	115	15	41	63	411	412	340	43·05	28·	13·62	15·33
Bihar and Orissa .	355	155	510	55	51	144	3	12	74	339	171	200	31·27	42·48	4·42	21·83
Madras . . .	576	Included in ordinary 2nd appeals	576	5	8	118	7	1	63	202	374	307	0·44	58·42	3·96	31·18
Bombay . .	48	145	193	30	9	28	5	21	33	126	67	..	30·95	22·22	20·64	26·19
Sindh . . .	Not given separately.		110	16	15	10	1	..	12	54	56	contested 697	57·4	18·52	1·85	22·23
Agra . . .	..	..	269	21	..	106	6	8	40	181	88	170	11·5	58·5	7·9	22·1
Oudh . . .	86	36	122	4	14	50	5	13	15	101	21	100	17·82	49·5	17·82	14·86
Punjab . . .	Not given separately.		665	186	24	94	13	30	67	414	251	188	50·72	22·70	10·39	16·19
North-West Frontier .	58	5	63	17	3	11	2	1	5	39	24	212	51·28	28·2	7·7	12·82
Burma . . .	..	..	151	37	..	38	3	5	13	96	55	..	38·54	39·58	8·34	13·54
Central Provinces .	67	59	126	11	5	27	2	11	8	64	62	120	25·0	42·19	20·31	12·50
TOTAL .	..	..	3,608	495	193	741	62	143	393	2,027	1,581	..	33·04	30·55	10·13	19·38

Statement showing results connected with Miscellaneous Appeals—District Courts—1922.

Province.	For disposal omitting transfers.	Summarily dismissed. o 41 r 11.	Dismissed in default.	Confirmed.	Modified.	Remanded	Reversed.	Total decided.	Pending at end of year.	Average duration in days.	Percentage 3 & 4 to 9.	Percentage 5 to 9.	Percentage 3 & 7 to 9.	Percentage 8 to 9.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Bengal and Assam	4,745	66	695	1,780	62	136	731	3,470	1,475	133	21·88	51·3	5·71	21·11
Bihar and Orissa . . .	2,415	38	349	863	16	91	379	1,736	679	141·7	22·29	49·72	6·17	21·82
Madras	1,754	43	74	645	45	173	329	1,309	445	126	8·94	49·27	16·65	25·14
Bombay	382	71	31	101	7	24	29	263	119	166	38·78	38·4	11·78	11·04
Sindh	120	8	17	23	2	..	26	76	44	C.443 U.C.42	32·9	30·26	2·63	34·21
Agra	797	7	38	326	15	54	129	569	228	98	7·9	57·47	13·13	22·5
Oudh	258	2	16	115	11	8	35	187	71	146	9·7	61·5	10·1	18·7
Punjab	2,439	336	142	764	72	228	314	1,856	582	74	25·75	41·16	16·17	16·92
North-West Frontier	232	68	5	38	8	16	62	197	35	56	37·1	19·29	12·18	31·43
Burma	334	53	..	115	13	11	97	289	45	not given	18·34	39·79	8·30	33·57
Central Provinces	416	21	35	163	16	38	68	341	75	90	16·42	47·8	15·83	19·95
TOTAL .	14,092	713	1,402	4,933	267	779	2,199	10,293	3,799	..	20·54	47·92	10·17	21·37

Table of Letters Patent Appeals against appellate decisions of a single Judge or Bench.

Court.	Number pending.	Number instituted in 1922.	Total number for disposal in 1922.	Number decided in 1922.	Number left undecided at close of 1922.	Decrees upheld.	Percentage of 7 to 5.	Decrees modified.	Percentage of 9 to 5.	Appeals sent back for rehearing	Percentage of 11 to 5.	Decrees reversed.	Percentage of 13 to 5.	Duration in days.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Bengal and Assam	35	60	95	64	31	57	89·06	..	..	1	1·56	6	9·37	304
Bihar and Orissa	55	29	84	75	9	51	68·00	..	..	3	4·00	21	28·00	209
Madras	25	29	54	34	20	11	32·35	..	..	..	..	23	67·64	193
Bombay	28	36	64	53	11	45	84·90	4	7·54	..	..	4	7·54	..
Agra	..	..	329	208	121	176	84·61	..	..	1	·48	31	14·90	217
Punjab . .	..	..	347	279	68	196	70·25	50	17·91	3	1·07	30	10·75	122
TOTAL .	..	..	973	713	260	536	75·17	54	7·57	8	1·12	115	16·12	..

Burma shows no figures as it did not become a High Court till 18th December 1922.

CHAPTER 20.

Appeals. Considerations as to the right to appeal.

1. Whatever hopeful estimate may be made as regards each province as to the time which second appeals and Letters Patent Appeals will take in the future to come on for hearing we think that the above statement of the present system is sufficient in itself to show that it fails in very many cases to enable a decision to be reached without an unreasonable and uneconomic expenditure of money, time and effort. This is "a denial of justice": yet it is difficult to think of any suggestion for reform that is not widely opposed in the name of justice. A reasonable promptness in the granting of effective relief is part of the ordinary notion of justice. We are quite satisfied that delay which appears to us to be intolerable is not so regarded by the mofussil litigant. Nor have we been able to discover anything held by him in such small esteem that he would be willing to sacrifice it in the interest of speed. Reasonable expedition as a necessary element in justice has but a limited "public."

2. The evidence given before us appears to show that the Bar in India is, speaking generally, opposed to any attempt to restrict appeals in any classes of cases. We do not doubt either that there is considerable public opinion behind this opposition. We think, however, that there is something of prejudice and of fallacy in the way in which the matter is generally viewed. It is most noticeable that while the interests of the appellant, the cost to the State and the burden upon the judges attract attention, the interest of the respondent slips out of view. After all the whole question is how to arrange that as between two parties the system may be least unfair to both. No doubt all difficulty vanishes if one looks solely to the interest of one. The appellant is generally envisaged as the poor man who has unfortunately lost in the court below; who has a "grievance;" who wants "justice;" all he asks is a chance, or a run for his money; his appeal should not be "burked;" it is conceivable that he is in the right or at least that the judge has said or done something wrong and so forth. That he has had two hearings already and proposes to put the respondent at his option to a further contest lasting (usually) a year or more with all the attendant consequences of further expense and delay—this is not in general considered.

3. Leaving aside mere failure to recognize the need for any reform and mere prejudices of one sort or another it is necessary to enquire what are the serious considerations which have prevailed to continue until now a system of which the evils have throughout been handsomely acknowledged. We find that they may be set out as follows:—

(1) the badness of the lower courts and the public's want of confidence in them.

(2) that the court of first appeal is not necessarily better than the trial court.

(3) that to make the right of second appeal depend upon whether the court of first appeal reverses or affirms would impair the value of the first appeal.

(4) that the value of a suit may be no test of importance (especially in suits which are not of the Small Cause Court type).

(5) the difficulty of valuing suits so as to draw a clear line at a low figure.

It seems necessary to state our opinion as to the force of these objections, since their force has in some cases been generally overestimated and they have frequently been urged as though the present system was so excellent that any proposed modification can be rejected, merely because it is open to some objection. In truth the present system is open to many objections. As regards the alleged badness of the lower courts and the importance of the cases which come up on second appeal, it is necessary, we think, to guard against the general tendency to over-statement.

4. So far as the courts are concerned, the success of the judge in doing justice according to law depends not merely on his ability or attainments, but on the materials put before him and on the candour and common-sense with which they are presented. The difficulties of our trial courts are not so much occasioned by the mere complexity of facts or technicality of law as by want of sense, truth and care on the part of the litigant and by the deficiencies of the Bar. A discussion of the defects of the lower courts and the public's want of confidence in them had better begin with a recognition that "the *badness* of the courts" is largely the badness of the litigants and of the Bar. So far as regards the judicial officers who try at first instance suits valued under Rs. 1,000 (for some provinces the figure is Rs. 5,000) it must certainly be admitted that they are often inexperienced. The legal equipment with which they commence their career varies if one looks at India as a whole from that of a competent young pleader downwards through degrees of insufficiency. It must be admitted further that constant hard work in court is not an ideal method of improving their quality. A considerable proportion of them could not be described as good lawyers even after six or ten years experience. The better class of practitioner at the Vakil Bar of a High Court or at the Bar of many district courts attains to a wider and better knowledge of law than is ever reached by many of the judges who enter the subordinate judiciary. This is by no means altogether the fault of the officers. Their own improvement and development is under Indian conditions too frequently sacrificed to the necessity for getting through the constant mass of work.

5. The courts which most affect the question of second appeals are however the lower appellate courts. These are officered by senior men; and for the purpose of revising in appeal the decisions

given in cases of a type with which they are familiar, they are, in general, satisfactory. Probably the main weakness here is in the fact that most district judges, when they begin to hear first appeals, have at present insufficient training or experience in civil law and practice. In some provinces too the more senior men in the subordinate judicial service were first appointed at a time when the legal qualifications demanded were not so high as now. Some started life as members of the ministerial staff of a court. Others even recently have been appointed without having any recognised legal qualifications. Such facts being well known to the Bar and to the local public, prejudice or communal feeling produce criticism and suspicion without any adequate occasion. Even so, however, we think it wholly wrong to say that a civil appeal of any well recognized type is not tried before a satisfactory tribunal in the great majority of cases. We think moreover that the work of the mofussal Bar on first appeal is open to much less criticism than the work done at first instance. The judges who bear these appeals have in general jurisdiction to try at first instance cases of unlimited value. They are the class of men to whom Small Couse Court powers are in general given, when necessary, up to the maximum limit. The Judicial Committee of the Privy Council have not infrequently been struck by the high quality of their work and the tradition of great care and industry which is, we think, a marked feature of their judgments. So long as their main function in contested cases is confined to the digestion of materials for purposes of a decision by the High Court, it will always be possible to say with some show of truth that the public confidence in them is not great. This sort of statement generally means very little. Since 1861 cases of the Small Cause Court type have not gone to the High Court on appeal unless the value was over Rs. 500. So far, this has been the only opportunity of the subordinate judge in particular to show what he will do, if left to himself. In spite of the fact that these cases may raise difficult questions and that both the Bar and the public tend to regard any decision as arbitrary or ill-considered, where the threat of appeal is not present, we know of no ground whatever for the suggestion that the Small Cause Court work has not been done successfully, or that the public has any real sense of grievance.

6. Still it seems necessary to recognise that the lower appellate courts are not so uniformly good as to be unimpeachable, and that when a judge sits alone as an appellate court and overrules the trial court, the losing party cannot in general be expected in matters of real moment to him to rest content with the decision. It has often been pointed out (Sir Richard Couch in a minute of November 1872 laid great stress upon it) that circumstances not seldom arise in lower courts in which the senior officer cannot well claim to be more experienced or more highly trained than the junior and that the trial court is almost always in a better position to decide on facts. If it be possible to refuse the right of second appeal in the case of concurrent judgments without impairing the

value of the first appeal as regards points of law, we think that the lower courts are on the whole good enough to make it right and reasonable for the State to restrict second appeals save where the value is such as to show that there is a presumption of special importance to the parties. A subordinate judge is for many reasons anxious not to be a source of trouble to the High Court and not to have his decisions reversed. So far as facts are concerned, there would be no real objection to a system under which the appellate court would be unlikely to disagree with the court which heard the evidence unless it was clearly convinced that the trial court had decided wrongly. But, so far as regards points of law, it would be a real misfortune if the small land suit, for example, were casually examined on first appeal in a biassed fashion. If, moreover, the right to appeal were refused on the ground that two courts had concurred, it would not seem defensible to limit the appeal when they differ on the facts, to mere questions of law. It may certainly be said that to think that the presence or absence of the right of appeal would influence the appellate court's decisions, save perhaps in a negligible number of cases, is to cast an undeserved reflection upon the conscientiousness and independence of the lower appellate courts. There is moreover warrant in principle for refusing an appeal when courts occur (*cf.* the observations of Lord Hobhouse quoted in Chapter 18, *supra*) and in practice this is now applied in a limited fashion as regards appeals to the Privy Council. In Burma a second appeal lies on fact as well as law if the courts below disagree: we are informed that this arrangement has not been found to affect the decisions on first appeal. Still, the conditions under which the lower appellate courts work are different and neither analogy nor abstract principle can be allowed to determine the question.

7. We are loath to close an avenue which would lead to a very considerable reduction in second appeals especially as there is room for wide difference of opinion as regards the force of the objection that the value of the first appeal would be seriously impaired by the knowledge that a judgment that confirms would end a case while a differing judgment would lead to an appeal. We think however upon the whole that it would be difficult for lower appellate courts in the circumstances to keep their minds free from conscious or unconscious bias, and that having regard to the suspicion engendered in the public mind it would be unfair to them and inadvisable in the public interest to require them to work under such conditions. At present they do a great deal better justice than they get credit for; and it is essential that their decisions should have all the appearance of justice as well as the reality. They should be allowed to do justice "as a just man would do it." For the same reason we think that the right of second appeal cannot be made to depend upon leave granted by the first appellate court. The case of "custom" in the Punjab may be regarded as a special case: indeed the element of fact is the more important aspect of it. Speaking generally, power in

the lower court to grant leave to appeal should be accompanied by a like power in the higher court: this exposes the higher court to many applications for leave.

8. If these conclusions be right, the possibility of limiting appeals is seriously narrowed: moreover it seems unlikely that much will be gained by waiting until some future date by which the lower courts will have substantially improved. Improved methods of recruitment are for many years to come more likely to level up the attainments of the junior officer than to widen the gap made by the teaching of experience between the junior and senior. Whatever changes may be made in the list of suits excluded from Small Cause Court jurisdiction the ordinary suit about land or interests in land must remain. Here summary procedure is inapplicable and there is neither extravagance on the part of the State nor other avoidable evil in the provision of one good appeal as of right. There are other types of case also, of which the same may be said even when the valuation for purposes of jurisdiction is low. If appeals cannot be prohibited when two courts concur and if the decision in appeal cannot be made final when they differ, the evil of second appeals must go on unless they are subjected to some sort of scrutiny. This in substance is the present method under Order 41, rule 11, but the method of scrutiny seems capable of improvement. It is true that at present, when a munsif (for example in Bengal) tries under ordinary procedure a simple money claim under Rs. 500, the subordinate judge on appeal may reverse his decision and no appeal will be possible. This at present happens only where the local munsif is not sufficiently empowered to deal with the case summarily under the Small Cause Courts Act. Usually, therefore, the subordinate judge will be doing no more in finally deciding the case than he could have done at first instance under his own powers and in any event the High Court could confer such powers. Hence no great anomaly exists as regards such cases.

9. The Judges of the Calcutta High Court at one time suggested that this procedure could with advantage be applied to certain particular kinds of cases which are at present excluded from the Small Cause Courts. *Primâ facie*, it would appear that the schedule to the Small Cause Courts Act excludes some types of case from the jurisdiction of such courts not because of their importance but because the questions on which they depend cannot be properly elucidated in a summary fashion; and it seems right that there should be at least one appeal. Upon a scrutiny of the schedule to the Act we think that more harm than good would be done by an attempt to single out cases from the list therein contained and to exclude second appeals altogether in such cases where the valuation of the suit is small. Still more harm would be done by an attempt to frame an independent list based upon a different classification. Here again it is necessary to keep one's eye fixed upon the main type of Indian case, the small suit for land or interests in land. A tenant's small homestead, a small piece of land at the back of

a weaver's hut where he has been accustomed to work, a right of way over a small piece of ground, a right of fishing—it may be in a navigable river—these are common cases of small valuation in which under the present circumstances a second appeal is often reasonable enough,—far too often for such appeals to be abolished, though not often enough to ground an indiscriminate license of appeal. No classification that we can suggest can by the use of general descriptions distinguish such cases from others and it is highly inadvisable to increase the complexity of our procedure law at a point where it is sure to be subjected to great contest.

10. We fully recognise that the proposition that the importance of a case cannot be determined by its valuation, is frequently stated much too roundly and that for the present purpose it is less than a half truth. The great majority even of land suits or easement suits have no claim whatever to be treated as more valuable to the parties than a money claim for Rs. 500. In any case the litigant will frequently lose in costs what he gains by the litigation. Moreover, we are not much impressed with the contention that small cases may involve important points of law, that is, points of law of wide or general importance. The litigant in a small case is not usually concerned save for himself. It is specially important doubtless that certain questions, for example under the Bengal Tenancy Act, should, when authoritatively decided, be determined rightly, by reason of the wide applicability of the *ratio decidendi*. It is not, however, necessary to this end that *every* case should be appealable as of right to the High Court. To the litigant pleading public importance (or much more probably to the pleader) one may generally say, as Adam Smith said of the man who professes to trade for the public good, that such people are few and that few words need be used to dissuade them from it.

11. When all this, however, has been taken into account, it still remains that the decision of a subordinate or district judge should not be made final in many cases of small valuation and that on the whole it is not advisable to attribute finality by reason of concurrence of opinion in the lower courts. A consideration of the Suits Valuation Act (VII of 1887) reinforces this conclusion by disclosing two serious difficulties; first, the difficulty of fixing a low limit of value in a clear and certain manner, and secondly, the difficulty of fixing such a limit in such a way as to correspond with the real value of the subject-matter. The Act of 1887 has to be read with the Court Fees Act (VII of 1870) and the task is not easy. At present no great strain is thrown upon these Acts and they seem to work well enough for the purpose of distinguishing a case below Rs. 1,000 from one above Rs. 1,000, that is, a case which, *e.g.*, in Bengal, can be tried by a munsif, from a case that must be instituted before a subordinate judge. In most provinces the scale of fees laid down by the several High Courts varies according to the valuation of the suit. It seems to us however that the present law as to valuation would almost certainly work badly, if jurisdiction in appeal were made to depend

on a line of demarcation drawn at a low figure. The Act of 1887 throws most of the difficulties upon the shoulders of the Local Governments and the High Courts, who are empowered by section 3 and section 9 respectively to make rules, the former for the valuation of land and the latter for the giving of an artificial value to suits whereof the subject-matter cannot really be valued. Apart from this, it leaves much to the option of the plaintiff in valuing the relief sought and to the uncertain test of market value. In some provinces, *e.g.*, in Bengal, neither the Local Government nor the High Court have made any rules. In others, *e.g.*, in the Punjab, both authorities have done all that rules can do to clear up difficulties. Even when the Local Government has framed the most careful rules for determining the value of classes of land by reference to the amount of the assessment of land revenue, it may easily happen that the actual value of a piece of land is much greater than its value as computed by the rules. In areas where the land has been permanently settled, it may well be that rules for arriving at value upon the basis of revenue would have little application to any plots of land that are likely to engage the time of the court.

In suits too which come within the purview of section 7 (*iv*) and Schedule II, Article 17 of the Court Fees Act, 1870, it rests with the plaintiff to value his suit both for court fees and jurisdiction. No doubt the Patna High Court and to a certain extent the Calcutta High Court have held that under the law as it stands a plaintiff is not entitled to value his relief arbitrarily but the rulings of the other High Courts are to the effect that a plaintiff's valuation both for jurisdiction and court fees must be accepted. In actual practice there is no doubt that leaving to the plaintiff the right to value his suit in certain cases as he likes is most unsatisfactory and this is being recognised in the proposals recently made for the amendment of this section of the Court Fees Act. In this connection we would refer to the statement of values of title suits in second appeals in the Calcutta High Court up to Rs. 250 given in paragraph 11 of chapter 19. It will be seen that the number of second appeals in the Calcutta High Court in 1922 of the value of Rs. 50 and under was 419 and between 50 and 100, 222. These figures include no less than 78 and 41 appeals respectively in respect of suits brought for a mere declaration of title, suits which come under Schedule II, Article 17 of the Court Fees Act. Similarly suits for the establishment of title and for possession under Rs. 50 in value coming up in second appeal number 111 and 166 respectively. It is difficult to believe that any fair proportion of these suits was valued adequately to their subject matter. Other suits of which the value rests entirely with the plaintiff are such suits as for injunction, easement, restitution of conjugal rights, dissolution of marriage and setting aside of documents, decrees and sales. The decision of questions such as these may be often of great importance to the litigants and to leave to the plaintiff the sole right to fix valuation according to his own caprice is to

our minds wrong and enables him without any justification to regulate how far an appeal will lie, the valuation being absolutely uncertain and depending on the plaintiff alone.

Something should be done no doubt to stiffen the law as to valuation, by insisting upon the making of rules in all provinces under section 9 of the Act, and in other ways. It is not impracticable even now to draw a line at Rs. 1,000 or even at Rs. 500 but any line drawn at a lower figure would give rise to dispute and the different conditions in different provinces would produce a certain inequality in the operation of any such limit.

12. Both in Bengal and Bihar appeals under the rent law and appeals under the Bengal Tenancy Act form a special problem which the Legislature has already dealt with in a special manner. So far as regards questions which arise out of settlement proceedings, we are satisfied that any attempt to prohibit all second appeals under a given value however low would be objected to with great reason.

CHAPTER 21.

Appeals.—Opinions and Proposals.

1. From time to time our present system of appeals has been roundly abused both for the ineffectiveness of the right of "special" appeal and for the unlimited license granted to bring such appeals.

2. Many suggestions for reform have been made. It seems desirable to give some account of opinions recorded on this subject.*

Sir James Stephen in his minute of February 1872 thus summed up the views of the Judges at Calcutta:—"I think it is not an unfair summary of them to say that whilst they differ in details their general conclusion is, that the whole system of appeals in civil cases is radically faulty; that the number of appeals ought to be greatly reduced and the inferior courts much strengthened, and that the effect of this would be highly beneficial not merely to the subordinate courts but also to the High Court itself. The fault of the existing system as described by them is in a word that it aims at curing a rotten foundation by an intricate and expensive superstructure."

3. Sir Barnes Peacock wanted to abolish "special" (*i.e.*) second appeals altogether; pointing out, upon the figures for 1869, that as regards 1,543 special appeals under the value of Rs. 100 each "it would be cheaper to Government to pay the full amount of the appellant's demand with the costs of both parties and to give each a bonus for terminating the litigation than to support an establishment such as the High Court for deciding such differences." Other Judges wanted to abolish these appeals in cases under Rs. 500. Sir Richard Couch in November 1872 proposed that a general appeal should lie when the lower courts differed and that all special appeals should be abolished.

4. The Government of India in 1873 (in the time of Lord Hobhouse) proposed as follows:—

A. That no second appeal should be allowed as of right when the value of the suit is under Rs. 200.

B. That no second appeal should be allowed as of right when the appellate court agrees with the court of first instance.

C. That in other cases a right of general appeal shall lie to the High Court from appellate decrees of subordinate courts (except in cases falling under section 27 of Act XXIII of 1861, *i.e.*, Small Cause Court cases).

D. That the court pronouncing the appellate decree shall have the power of allowing appeals from its own decrees.

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* It has not been possible to collect the opinions of all the High Courts at various times on the subject of second appeals but it will be seen that the various opinions expressed by the Calcutta High Court from time to time to which reference has been made include every objection which can be urged against any change in the present procedure.

E. That notwithstanding prohibition A the High Court shall have the power of allowing an appeal if the nature of the suit is such that its value is not measurable in money.

F. That notwithstanding either prohibition the High Court shall have the power of allowing an appeal when the importance to the public in general of the question raised in the suit is so great as in the judgment of the court to call for an appeal.

5. From 1874 to 1886 the Government of India were engaged in a correspondence with the High Court at Calcutta which resolved itself ultimately into a scheme for the formation of appellate benches in the mofussil. The Secretary of State authorised in 1884 the experimental introduction of four such benches (to be raised afterwards to eleven) each to have jurisdiction over a group of districts, and each to consist of a member of the Civil Service and a member of the subordinate judicial service. They were to hear all appeals under Rs. 5,000. When they were agreed their decision was to be final in suits up to Rs. 500; otherwise an appeal lay to the High Court on facts and law. The High Court made various objections as to the workability of the scheme and thought the limit of Rs. 500 was too high, especially in rent suits. Ultimately in 1886 Sir Rivers Thompson explained that the circumstances in which his predecessor was able to promise his support to the scheme no longer obtained and financial provision for it was not possible. He considered that as at all principal stations there was a Civilian judge, subordinate judge and munsifs, all that was needed was for them to constitute a Bench, to hear appeals in civil cases limited in value, whose decisions should be final.

6. Meanwhile, prior to 1884, the Punjab with its divisional and district judges enjoyed a system—described as "a sifting of cases through a succession of bad courts in the hope that they will come right in the end." The Government of India with the sanction of the Secretary of State accordingly decided upon a system of divisional benches each to be manned by two members of the Punjab Commission or the Civil Service. These benches under the Punjab Courts Act 1884 heard appeals up to Rs. 5,000 in value (Small Cause Court case up to Rs. 500 going on appeal to the district judge). A single divisional judge could always dismiss an appeal but if he came to the conclusion that the appeal should succeed it had to be reheard before the bench. Decisions of the bench were final up to Rs. 500 but in suits other than "Small Causes" either judge could grant leave to appeal to the Chief Court. This system came into operation on the 1st November 1884 and lasted till October 1885. The Chief Court in September 1885 informed the Punjab Government that "the divisional courts have on the average disposed of at least as much judicial work as it was expected that they would have to do." But the number of appeals instituted exceeded all calculations and for this reason the scheme was breaking down. By April 1885 the benches had a pending file which represented about

ten months work. Accordingly the Judges of the Chief Court in July 1885 suggested that the system of benches be discontinued, *i.e.*, that the divisions should each be split up into two, and a single judge appointed to each new division. The division benches were consulted as to the working of the bench system and the Chief Court reported that "the answers of the divisional judges are with few exceptions unfavourable to the bench system as compared with that of divisions in charge of a single judge." The reasons given by the divisional judges are very instructive. First the smallest appeal relating to land had to come before the divisional court which was snowed under with disputes about spouts, drains, doorways, boundaries of a backyard, etc. The litigant with a case valued at Rs. 5 could only file his appeal at Jullundur though he lived in Kangra or Ludhiana. Secondly, the single judge who first examined the appeal in chambers and went into the facts had to refer the case for a bench hearing (to take place months afterwards) unless he was prepared to dismiss the appeal. When the bench came to hear the appeal it almost invariably took the same view as the single judge had done months before. In fact in some places the practice seems to have been for each member of the bench to go thoroughly into those cases only which had at first come before himself. "Want of time must necessarily prevent the second judge, coming new to the case, from going elaborately into the file." Again as regards cases over Rs. 500 in value and cases in which a certificate was given an appeal to the Chief Court was still open both on facts and law.

7. On these representations and in view of the block in the work of the divisional courts the bench system was abandoned by the Local Government after October 1885 without consulting either the Government of India or the Secretary of State. Both these authorities took strong objection afterwards to this action. "The scheme had received the approval of His Majesty's Secretary of State and of the Government of India after prolonged discussion and consideration and it formed part of the recommendation made by a conference of officers at Simla on the 24th August 1883 amongst whom were included the Judges of the Chief Court. When this conference was held it was admitted that the flow of appeals to the Chief Court could only be checked by strengthening the lower courts and no other mode of strengthening these courts had been suggested besides that of constituting benches. The experiment therefore deserved a fair trial, and although the Judges of the Chief Court have declared the system to be unsuited to the present state of judicial business in the Punjab, the Governor General in Council is not satisfied from the reports of the divisional judges that sufficient time was allowed to overcome the friction naturally incidental to the introduction of a new system or that the delay for which the system is said to be responsible was not in some measure at all events due to the defective manner in which it was worked rather than to defects inherent in the system itself. As the bench system has now been definitely broken up, the Government of India

will not insist upon its being restored, as frequent changes of this nature must necessarily be attended with much inconvenience" (3rd February 1886).

8. Accordingly the Government of India proposed to apply to the Punjab the ordinary provisions of the Code of Civil Procedure including the system of second appeals. The Chief Court successfully objected (*cf.* Act XIII of 1888).

The following passage from a letter from the Chief Court of the Punjab to the Local Government (24th December 1887) may be quoted.

"As regards this Province the second appeal of the Code was deliberately abrogated only three years ago. The proposal to abrogate it came from the Government of India in 1882 in the following words. 'The Governor General in Council is of opinion that the most effective line of reform would be to do away altogether with what used to be known as special appeals, *i.e.*, second appeals upon points of law only. No appeal can be satisfactory in which the upper court is unable to go into the whole case.' This view was acted upon in the legislation of 1884. A system of appeals upon matters of law only, by whatever name it may be called, is one in favour of which the Judges apprehend that next to nothing can be said. If the State could afford a sufficient number of Judges in the highest courts, it would presumably act on the principle that the court of last resort ought to have full power to deal with facts as well as law in every case in which the decree of a subordinate court is appealable to that court. An appeal upon matters of law only is in truth a mere expedient to which the State resorts upon financial considerations as a compromise between some appeal and no appeal."

9. In 1886 a "Finance Committee" (in more modern parlance a "Retrenchment Committee") appointed by the Government of India addressed the High Court at Calcutta on the subject of second appeals and earnestly begged the Judges to suggest some modification. After some demur the Court dealt with the matter in a letter to the Government of India. The Judges pointed out that the main evils were two. First that an immense number of second appeals are brought before the High Court in which the amount at stake is very small. Secondly that the Court, on second appeal, is often unable to do justice in a case from want of power to deal with it as a whole. "The ends which ought to be aimed at in any reform seem to the Judges to be two. First to limit the number of second appeals to the High Court if and so far as it can safely be done; secondly to empower the High Court to do complete justice in all such cases as do come before it.

"The first of these ends can only, the Judges think, be obtained, if at all, after a careful classification of suits; it can then be considered whether a rule analogous to that embodied in section 586 of the Civil Procedure Code which forbids second appeals in certain

cases under Rs. 500 in value should be applied to other classes of cases within defined pecuniary limits."

"If a large reduction in the number of second appeals were thus found to be practicable, it would have to be considered whether special precaution ought to be adopted to guard against miscarriage of justice. Particularly it would have to be considered whether or not the constitution of the first appeal courts ought to be strengthened and whether or not the revisional power of the High Court should be enlarged so as to enable it to interfere in any case in which substantial injustice has been done."

10. The Government of India later in the same year (25th November 1887) suggested that more use should be made in the High Courts of Judges sitting singly: that they should, subject to a power of reference to a Bench, (*inter alia*) decide (1) all second appeals up to Rs. 1,000, (2) all civil revision cases, (3) all miscellaneous appeals arising from the execution of decrees, etc., (4) all cases under section 551, now Order 41, rule 11, of the Code of 1908. The Judges at Calcutta replied that in view of the Letters Patent Appeal no economy of time or power is effected by having appeals heard by a single Judge and that if the proposal was to modify the right given by the Letters Patent they were strongly against it. They recalled the fact that in England the hearing of appeals by a single Judge was after centuries of experience abandoned in 1875; then enlarged on the difficulty and importance of the classes of work above mentioned; and said that any legislative change which gave finality to the decision of a single Judge would, they are sure, seriously shake public confidence in the decisions of the Court. "It is at all times undesirable that a decision arrived at by one Judge should be liable to be revised by another. The decision of one Judge on appeal can never carry the same weight as that of two. Every man's mind has its own idiosyncracies and it is only by associating more Judges than one in the decision of every case that such idiosyncracies can be counterbalanced and guarded against."

11. In 1888 Sir Comer Petheram proposed that all second appeals should be abolished but that the revision section of the Code should be altered to include cases in which "a failure of justice has occurred." Certain of the other Judges dissented: among them Sir Arthur Wilson, more particularly on the ground that the High Court would be flooded with applications in revision.

12. In 1897 the Government of India made fresh proposals which included the following:—

(1) That when appeals from Lower Courts are heard by a single Judge, there should be no appeal from his decision, under the Letters Patent or otherwise, except by leave of the Judge.

(2) That security for costs should be given in every appeal unless the Court for good reason dispenses with it and that where there is a second appeal from concurrent decisions substantial security should always be given.

(3) That except by leave and in certain cases affecting land there should be no second appeal where the value of the suit does not exceed some fixed limit, say Rs. 500.

(4) That appeals on questions of procedure should be cut down and that except by leave there should be no second appeal on any question of procedure.

The Calcutta High Court renewed their objections to any modification of the Letters Patent appeal: strongly objected to the requirement of security as giving the rich litigant a great advantage over the poor litigant and as causing delay and increase of work by disputes over the security. They expressed themselves as against any rule making the right of appeal depend on value, as important questions may be raised in suits of small value. They suggested, however, that the list of interlocutory orders made appealable (by section 588) might be cut down and they offered to accept a provision making a strict hearing under section 551 (now Order 41, rule 11) compulsory in the case of all second appeals. Five out of eleven Judges were strongly in favour of disallowing all second appeals except by leave. "As regards the right of appeal generally, the Judges think that, however desirable it may be to curtail it, any wide-reaching scheme for that purpose must follow or accompany a scheme to improve the efficiency of the tribunals whose decisions are open to appeal. This was recognised in the scheme for mufassil appellate benches which was abandoned in 1886 apparently because the Government could not, or would not, face the extra expenditure involved in it. Nothing in the direction of improvement has been done since then."

13. In 1900 Government circulated for opinion a draft bill to amend the law of civil appeals. It prohibited second appeals (1) in suits of a Small Cause Court nature under Rs. 1,000 unless the decree involved directly some claim to or question respecting property of the value of Rs. 1,000, (2) in other suits under Rs. 200 (with a like reservation), (3) when the courts below concurred, unless the High Court certified that there was an important question of law or custom (not procedure) which required further consideration.

So far as the Calcutta High Court Judges were concerned, the proposals were all rejected. The Court referred to "the recognised want of experience and efficiency of many, if not an actual majority of the lower appellate courts" and said "that so far as the final disposal of suits is concerned it is not advisable to entrust the officers at present presiding over these tribunals generally with more extensive powers than they at present exercise whether in their original or in their appellate jurisdiction." They repeated that any wide-reaching scheme of the sort must follow or accompany a scheme to improve these tribunals. As regards concurrent judgments, they said that "it would be very inadvisable to make any distinction between judgments of affirmance and those of reversal. If a judge knows that a judgment of affirmance is not open to appeal save under

very particular conditions, such knowledge may be calculated to induce such affirmance rather than a reversal."

14. In Sir Thomas Raleigh's Bill of 1901 a revision of the Code was put forward containing as regards appeals provisions based partly on the draft bill of 1900. It was proposed that no second appeal should lie in suits of a Small Cause Court nature of value under Rs. 1,000 unless the decree involved directly some claim to or question respecting property exceeding such value. Also that in other cases no second appeal should lie unless the value of the suit was over Rs. 100. When introducing the Bill on 20th December 1901 Mr. Raleigh (as he then was) said:—

> "The Government of India has expressed the opinion that the right of second appeal ought in some points to be restricted and having full regard to all the remarks and suggestions that were made upon that expression of opinion, we have proposed to raise the pecuniary limit in those provisions of the Code which relate to second appeals, and we have also proposed that when the decisions of the courts below are concurrent security for costs may be required. I am well aware that any attempt to restrict the right of appeal in this country is sure to be closely scrutinised and very likely to be opposed. We are often told that the courts of first instance or first appeal in this country are sometimes deficient in special knowledge of law, sometimes deficient in strength of character, and that for these reasons it is necessary to preserve a liberty of second appeal, far wider than would be necessary, for example, in England. There is force in these arguments and they require to be considered. At the same time the objections are often expressed with a considerable degree of exaggeration. My deliberate opinion formed after a great deal of enquiry is that the civil courts of lower rank in this country do not deserve the terms of unqualified censure which are sometimes applied to them; and even if they did, it would, in my humble opinion, be a profound mistake to assume that every wrong decision of a lower court can be set right in a court of appeal."

15. This Bill of 1901, after much discussion and the collection of many opinions, was finally withdrawn altogether. A fresh draft code was prepared and submitted to the well-known Special Committee over which Sir Erle Richards presided—of which the other members were Sir Francis McLean, Sir Lawrence Jenkins, Mr. Ismay and Dr. Rashbehary Ghose. In their report (31st August 1907) they say: "as regards appeals from appellate decrees the only substantial departure from the existing code is the insertion of clause 103. Experience has shown the desirability of this clause, the effect of which will be to avoid remands, with their consequent delay and expense." When on the 6th September 1907 Sir Erle

Richards moved for leave to introduce the Bill which became our present Code, he said:—

> "No one can doubt that the multiplicity of appeals in India is an evil. On the other hand there is a strong feeling among the public that it would be an injustice to deprive them of the right of obtaining a decision of the highest tribunals. I hope, my Lord, that the time will come, and I believe confidently that it is coming, when by the improvement of the lower courts this feeling will subside. But for the present it is a factor which must be taken into account, and I think that it is wise to leave matters alone for the present."

16. The efforts of many years came accordingly to nothing "for the present," *i.e.*, seventeen years ago. Unless the use of Order XLI, rule 11, in a regular and systematic manner can be regarded as a considerable reform, the question seems to be much where it was when it attracted attention in the seventies.

CHAPTER 22.

Appeals.—District Appellate Benches.

1. That reform of present methods of dealing with the great volume of suits of small value in India should be based upon a strengthening of the lower appellate courts is no new opinion. It was held by Sir James Stephen in the seventies and it was accepted and acted upon by the Secretary of State and the Government of India in the eighties as regards the Punjab and Bengal. The opinion has often been repeated since—usually as a reason for obstructing any less ambitious reform. The great mass of Indian litigation is of a character and value which requires a trial and one good appeal both on fact and law. Any more elaborate or protracted process is not only unnecessary but an evil, and is all the more an evil by reason that the substantive law is in many respects complicated and technical.

2. The one fact which has made the present system a necessity in the past and which can be put forward as an element of reason for continuing it is that the courts of first appeal are not strong enough. A district judge after service as a joint magistrate is asked sitting alone to reverse on appeal the decision of a subordinate judge upon title to a plot of land or on a point of Hindu Law, or a subordinate judge reverses an experienced munsif on a question of fact. The litigant—who has no particular belief that either the law or the fact is ascertainable—is expected to acquiesce in the decision.

3. Whatever may have been possible or impossible in the past, the first question to be asked to-day is whether it is not possible now to give to cases of small or intermediate valuation a first and final appeal on fact and law before two trained, experienced and specially selected judges. If in any particular province this can be done, then the right of further appeal can be withdrawn, provision being made for cases of disagreement between the judges and for stating a case to the High Court upon specially difficult or important points of law, if the judges should think it necessary so to do. The advantages of such a system in economising time, money and effort, in obviating the confusion, oppression and fraud which accompany delay in the final decision, require no comment. Such a court would do no other work and the hearing of such appeals might be accomplished in much less time than is now usually taken up by the stage of first appeal in the district court. Government both in India and in England were at one time convinced of this and that it was the only line of real reform. Enough has already been said of the Punjab experiment of 1884 to show that it broke down for want of a fair trial. The scheme for Bengal discussed at the same time was in many respects financially extravagant.

4. To-day the position is this. It is quite possible in Bengal, Bihar, the United Provinces, Bombay and Madras to select a

certain number of senior subordinate judges who would make exceedingly competent members of appellate courts—quite sufficiently so to make their decisions upon fact and law reliable and to entitle them to authority whether they reverse or affirm the trial judge. There is no need to suppose that they would be incapable of applying ordinary legal principles as to the weight to be attached to findings of fact by the court that heard the witnesses. There would be no need to compel them to produce an independent treatise of their own reciting all the facts as though a judgment were a " case stated " for the opinion of a higher court on points of law.

5. Every case below a certain limit of value might get the benefit on facts as well as law of the opinion of two judges. It would be necessary to confine their jurisdiction to cases in which no further appeal is to be permitted. On this point both the Punjab and Bengal schemes of the eighties appear to have been somewhat ill-considered. If a " second appeal " is to be allowed then the first appeal cannot well be to two judges as two judges cannot be expected as a rule to set out a complicated set of facts exactly in the same way. Moreover the cost of the suggested change would be unnecessarily increased. Again, the disastrous notion which did so much to wreck the old Punjab scheme that the appeal should be heard first by a single judge with power to affirm but not reverse must be rejected altogether. It seems necessary too that such a court should be a court of equals (not a district judge and a subordinate judge for example) to avoid the appearance or suspicion that the junior was a mere echo of the senior. The district judge would remain at the head of the judicial system of the district as he now is.

6. Having regard to the fact that the limit of Rs. 1,000 has worked well as a limit for munsifs' jurisdiction in some provinces and to the fact that this limit would apparently be the most economical for the purposes of such a scheme, we would lay stress on the fact that we do not consider it at all too high. There may indeed be cases of a higher value which in particular provinces might well be entrusted for final decision to such a Bench. We observe that in the eighties the Judges at Calcutta under the scheme then proposed thought Rs. 500 too much. For the purposes of to-day and of such a scheme as we are discussing there is little point in taking one's stand at a figure of Rs. 300 or Rs. 500. Caution in these matters and even timidity are to be commended but the scheme is not one to give a bad court to cases because they are small: the object is to give to the smaller case a good court at the earliest moment. The Indian legal system must be considered in perspective. The subordinate judge or " first class subordinate judge " in India corresponds as a trial judge not to the English County Court judge but to the Judge of the High Court. The appellate side of the High Court does work which in England is done by the Court of appeal. The correspondence is in neither case exact but it is close enough to deprive of any air of paradox the suggestion that two selected subordinate judges should have

finally appeals in all suits up to Rs. 1,000. Nothing could be less hopeful than to stamp such a court as one entrusted with the smallest cases only. One may take the suit for land or interests in land as the commonest and the representative case. If such a court can decide the petty land suit there is no necessity to confine it to such land suits only as are petty and much is gained by not doing so.

7. It may certainly be necessary to group several districts and to make the most central headquarters station the place at which the appeals are heard. The litigant would not always have the advantage of having the first appellate court so near to his own village as at present the subordinate judge or district judge is. To some extent also the business of the local Bar as regards civil appeals would be interfered with, though a convenient arrangement of the lists in the appellate court might do much to minimise this. It might be possible in some places to arrange for the appellate court to sit in more than one place at different times. These objections or difficulties seem to us to weigh very little indeed against the advantage of giving a good appeal—first and final—to the smaller cases which now drag their way to the several High Courts.

8. We appreciate that some provinces would have special difficulties in finding judges of the necessary attainments either by reason of the increase in cost, or by reason of intense and general communal hatreds or suspicion. Local conditions and the practice in past years as regards recruitment to the subordinate judiciary are here important. For one reason or another we could not recommend the scheme for Burma, the Punjab, the Central Provinces or Sind; and we doubt whether it would have any chance of acceptance in Bombay, so long as the great bulk of the appellate work in the High Court can be managed by a single Division Bench.

9. The main objections to the proposal are two: *Firstly*, the objection as to the cost of such a scheme, and *secondly*, the objection which arises from the fact that the scheme makes so great a change in present practice as to have little chance of being approved by public opinion which in these matters is highly conservative. So far as we can judge the saving effected by eliminating the great bulk of second appeals from the High Courts would in the long run be sufficient or nearly sufficient to provide the salaries of the extra judge in the proposed courts of first appeal. It has to be remembered that second appeals once brought have to be disposed of some day and so long as they remain undisposed of they represent a concealed debit to the State. The comparison must be between the expense of disposing of the second appeals—not of ignoring second appeals—on the one hand and the expense of providing an extra judge for first appeal on the other. In each province the question of grouping districts for the purposes of such appellate benches would involve a special knowledge of local conditions. It is thought that on the average taking first appeals below Rs. 1,000 of all kinds, an appellate court would be able to dispose of five appeals per day. It is not possible for us as a

Committee to work out a complete scheme for each province but one of our members has worked out a scheme for the province of Agra and we append the same to this chapter as giving a concrete exemplification of the proposal.

10. The main objection, however, to the proposal is not on its merits but in the circumstance that it offends both prejudice and vested interests. Having regard to the terms of reference to this Committee, we feel obliged to report that in our opinion it is now quite possible in the provinces mentioned to provide in the manner we have suggested courts sufficiently competent to be made courts of final appeal for the smaller classes of case which now come before the High Court on second appeal. It is not in the least degree probable that we are within measurable distance of the time when a case will come on for disposal as a second appeal within a period substantially less than two years from the institution of the suit. If, however, any particular province desires greater expedition it can have it by the method we propose. The effect would be to abolish the practice of cutting up cases into facts (on which the opinion of the first appellate court is final) and law (upon which lies a second appeal); to give to each appeal a better tribunal for the decision of questions of fact; and above all things to give an effective decision within a reasonable time of the conclusion of the judgment of the trial court. It seems to us that questions of law of any general importance and difficulty would, under the scheme which we suggest, find their way to the High Court and that different rulings would not long continue to be given by various appellate benches. Whether the points involved in a case fit it for reference to the High Court or not is a question which two experienced judges may be trusted to decide and the result will be much fairer so far as regards the respondent than if the matter be left as at present to the mere option of the losing party.

11. It was suggested to us in the course of the Assam and Punjab evidence that the limit of Rs. 5,000 should be raised to Rs. 7,500 or Rs. 10,000 so as to make the first appeal (as we at present have it) lie direct to the High Court only in cases of the larger value. A proposal on these lines was made by the Judges of the High Court at Lahore and was discussed in the Punjab Legislative Council though it was not accepted. We understand the reasons in favour of this line of change to be, *firstly*, the comparative costliness of first appeal before a High Court, and *secondly*, the fact that the High Courts have too much work. We are of opinion that the true line of reform lies in the opposite direction, and that the aim should be to give as strong an appellate court as possible at the earliest moment and to put that court in the position of hearing a full and final appeal on facts as well as on law. The actual number of cases between three and five thousand rupees in value in any province is not so great as to make the difference between the hearing of first appeals and second appeals a very important matter. If one looks to the future it seems more reasonable to anticipate that appellate benches in the muffasil on the lines we have suggested would in due course justify themselves

before the public sufficiently to enable their jurisdiction to be raised to a point at which it would meet the High Court jurisdiction, the second appeal as we now know it becoming a thing of the past save possibly for special purposes. What is necessary to this end so far at least as Bengal, Madras, Bihar and Orissa, and the United Provinces are concerned is not the lapse of further time to enable a better trained subordinate judiciary to grow up, but a better public opinion, a more reasonable and instructed view of the duty of the State as regards litigation and a better appreciation of the public and private evil that is necessarily caused by protracted proceedings.

APPENDIX TO CHAPTER 22.

Province of Agra.

Estimated number of Munsif's and Miscellaneous appeals to be heard by such a Bench.—Standard, 1250.

1. Meerut	778		Bench No. 1.
2. Muzaffarnagar			This Bench would sit at Meerut all the year round.
3. Saharanpur	355	1,133	
4. Dehra Dun			
5. Bareilly	417		Bench No. 2.
6. Pilibhit	26		This Bench would sit at Bareilly all the year round for 5, 6, 7, 8, 9. An additional Bench would be constituted to sit at Moradabad for 10, 11 from 2nd January—31st March, 1st July—31st August.
7. Bulandshahr	193		
8. Shahjahanpur	213		
9. Budaon	360		
10. Moradabad	515	1,724	
11. Bijnor			
12. Aligarh	391		Bench No. 3.
13. Etah			This Bench would sit at Agra all the year round.
14. Agra	440		
15. Muttra			
16. Mainpuri	347	1,178	
17. Etawah			
18. Cawnpore	401		Bench No. 4.
19. Fatehpur			This Bench would sit at Cawnpore all the year round.
20. Banda			
21. Hamirpur			
22. Farrukhabad	314		
23. Jhansi	116		
24. Jalaun			
25. Allahabad	294	1,125	
26. Mirzapur			

27. Benares . . .	1,059		Bench No. 5.
28. Jaunpur . . .			This Bench would sit at Benares all the year round for 27, 28 and part of 29 and 30; an additional Bench would be constituted to sit at Ghazipur for remainder of 29, 30 from 1st February—31st March, 1st July—31st August.
29. Ghazipur . .	578	1,637	
30. Ballia . . .			
31. Gorakhpur . .	851		Bench No. 6.
32. Basti . . .			This Bench would sit all the year round at Gorakhpur.
33. Azamgarh . .	392	1,243	
		8,140	This represents a year's working of three district judges and three subordinate judges.

CHAPTER 23.

Appeals.—Statement of main recommendations.

We proceed now to consider what reforms ought to be recommended as regards appeals on the assumption that trial courts and first appellate courts cannot be substantially strengthened and must remain for some years to come much as they now are. On this assumption we see our way to make three main recommendations.

First, restriction of Letters Patent Appeals arising out of Second Appeals.

Secondly, a change in the form in which Second Appeals are scrutinized under Order XLII, rule 11, and

Thirdly, an automatic requirement of the deposit of a fixed sum by the appellant as security for the respondent's costs.

CHAPTER 24.

Appeals.—Restriction of Letters Patent Appeals.

1. Most High Courts do a large amount of important and difficult work by means of Judges sitting singly, but in this matter there is much variation between one High Court and another. Leaving on one side the practice of courts of Judicial Commissioners or what used to be the practice in Chief Courts we may notice that in Burma all criminal appeals and revisions except in murder cases are heard before a single Judge and that in Allahabad and Lahore a single Judge exercises the criminal jurisdiction of the court in any case (speaking broadly) in which sentence of death or transportation for life has not been passed. On the other hand on the appellate side of the Calcutta High Court, except for cases of fine which are occasionally decided by a single Judge, all criminal business is done by a bench; and in Patna a single Judge deals only with cases not involving more than six months' imprisonment.

2. As regards second appeals the present practice would appear to be as follows:—

In Calcutta though rules allow for second appeals to be dealt with by a single Judge if valued under Rs. 1,000, in practice, very few second appeals are so dealt with, those which are decided by a single Judge being usually cases valued at below Rs. 50. In Allahabad and Lahore second appeals under Rs. 500 in valuation are regularly dealt with by a single Judge. In Patna the figure now taken for this purpose is Rs. 1,000. We understand that in Bombay while a single Judge is used for hearing cases under Order XLI, rule 11, appeals which have survived this test are not in general heard by a single Judge. In Madras since the beginning of the present year the practice has been for all second appeals save for special reason to be heard by a single Judge. In Rangoon a single judge deals with all second appeals below Rs. 3,000 in value, but the Letters Patent for Rangoon restricts the right of appeal from the judgment of the single Judge in second appeals by requiring a certificate of the Judge that the case is a fit case for a further appeal.

3. The application to the smaller appeals of a system whereby the High Court is obliged to entertain the appeal twice, appears to us to be so indefensible whether from the point of view of expedition or of cost to the State or of cost to the parties that it is almost a waste of words to denounce it. By the time the respondent has fought his case through two courts one would suppose that the High Court might deliver its final decision at the third hearing. If the second appeal is not before a tribunal which can be trusted to dispose of it satisfactorily, the parties are getting something less

than justice. The principle of providing a small case with a series of bad tribunals which are good enough to adjudicate but cannot be entrusted to decide is here carried to an extreme that can please no one. The least that can be tolerated in the way of "tardy justice" is that when the High Court does entertain cases of small value it should make up its mind before hearing them to furnish a tribunal fit to quiet the matter. In any High Court it is possible for the appellant or respondent who thinks that the importance or difficulty of his case, notwithstanding its low valuation, is such that a single High Court Judge cannot satisfactorily decide it, to explain to the Judge the nature of the difficulty and to request him for good reason to transfer the appeal to a Bench for decision. In addition to this safeguard it is possible to provide another, namely, that the Judge himself should be permitted to grant a certificate that the case is of such difficulty or importance that a further appeal should be allowed. Most of the High Courts are at present obliged to employ single Judges for the smaller second appeals with the result that in a substantial proportion of the cases which they decide Letters Patent appeals are brought requiring the attention of a Bench both under Order XLI, rule 11, and at the final hearing. We understand that in Burma where the Letters Patent Appeal only lies upon certificate such appeals are seldom permitted by reason that it is considered that the proper time to insist upon the exceptional importance or difficulty of a case is before the single Judge proceeds to deal with it. This after all is only common sense, but cases may arise in which such a certificate would be justified.

4. In 1916 the Government of India made two suggestions for curtailing the right of appeal from a single Judge of the High Court. One of these suggestions was effected by the alteration of the various Letters Patent in 1919 when judgments passed in civil cases in the exercise of the court's powers of revision and superintendence were made unappealable. The other suggestion was that in second appeals valued below a certain sum such as Rs. 500 no Letters Patent Appeal should lie. We have had an opportunity of seeing the opinions recorded upon this suggestion by the various High Courts and by a large number of other people. The High Courts at Allahabad and Patna were the only High Courts who favoured this suggestion. The majority of the opinions sent in were against it for reasons which seem to us to show an almost complete failure to appreciate the position of a party put to the expense of four hearings with no certainty of a decision even then. We may be allowed to say, with respect, that it would require a great deal more reason than these opinions disclose to persuade us that such a system is not intolerable for any type of case and execrable for small cases. So far as we can gather the reasons urged in defence of the present system are: *firstly*, that the real value and importance of the right involved in a suit valued at Rs. 500 or less cannot be judged by its money value; *secondly*, that there is no safe method by which the important and the unimportant can be differentiated; *thirdly*, that the opinion of two Judges is better than the opinion of

one; *fourthly*, that any restriction on the right of appeal from the decision of the single Judge is likely to lead to a lower standard in his work; and *fifthly*, that the Judge is not likely to give leave to appeal from his own decision. Save for these reasons we cannot discover that the opposition to the proposal was based upon anything more convincing than a general objection to any reduction of appeals, a general opinion that judges are not so good as they should be or as they used to be, a general idea that a liberal right of appeal is the principal safeguard to the poor man that he will ultimately obtain justice, and a general inability to understand the nature and conditions of the problem.

5. There are two ways only of getting rid of the Letters Patent appeal from decisions on second appeals. One is to lay down as a rule that no second appeal shall be heard save by a Bench; the second is to determine finally by a single Judge cases as to which special importance or difficulty cannot be shown by the parties. In some provinces the circumstance that first appeals remain pending for three years, second appeals for two, has not prevented the contention being raised that all second appeals should be heard by two Judges. If in any province the Judges necessary for this purpose are in fact provided, such a course would be free from objection. Looking at India as a whole, however, it is idle to shut one's eyes to the fact that not only must a large number of second appeals be heard before the single Judge, but that the single Judge must continue to do a great deal of work of incomparably greater importance and not less difficulty. When, as in the Punjab, a Chief Court becomes a High Court, each Judge appears to be invested with an incapacity for finally deciding second appeals as one of the privileges of his office.

6. The Letters Patent Appeal has been abolished as regards civil revision. It is particularly easy in the case of second appeals to guard the jurisdiction of the single Judge by permitting reasons to be shown for a hearing before a Bench. Hitherto such applications, when made, have been very readily allowed and there is no reason to apprehend that any High Court Judge would be particularly anxious to decide a second appeal if either party, for any real reason, desired the opinion of two Judges. In these circumstances the consideration that two Judges are better than one seems insufficient to justify the continuance of a system which gives to one party the option to require a fourth hearing. In like manner, unless one is prepared to say that any dispute affecting land is *eo ipso* too important to be left to a single High Court Judge, the consideration that small cases *may* have great importance is given an exaggerated force if it be allowed to prevent the proposed change.

7. High Court Judges, when acting as a Bench, are accustomed to decide cases without the stimulus provided by the knowledge that an appeal is probable or possible. Since there has to be an end to litigation at some time, the question of the exact amount of litigation reasonably necessary seems to be a question of degree, to be settled with an eye to the respondent as well as to the appellant and

in a spirit of practical common-sense. For this purpose it would seem best to presume that a High Court Judge would be at least as capable of doing justice to the smaller civil work when sitting singly as he is in like circumstances when exercising jurisdiction in criminal matters, or in civil revision. To frame a judicial system upon a principle of valuation, to postulate thereupon that value and importance are out of all relation to each other, to doubt the capacity of judges all along the line, to envisage the possible appellant as a poor man striving for justice as a flying goal which fades for ever as he runs,—this line of reasoning is undoubtedly fatal to the curtailment of any rights of appeal even when they have arrived at absurdity. In our opinion the Letters Patent Appeal, that is the right to a fourth hearing, is in no degree short of absurdity. There is no guarantee whatever that a Letters Patent case will be half so important, from any point of view, as a money decree in a Small Cause suit; and no probability that the judge who decided the second appeal will be any more careless, arbitrary or eccentric than a judge exercising Small Cause Court powers.

8. The extent to which a single Judge should be used for the decision of second appeals, *e.g.*, whether for cases below Rs. 500 or for cases below Rs. 1,000, is one to be settled specially for each individual High Court. In our opinion the essential thing is to prescribe that whenever second appeals are heard by a single Judge this should be done upon the terms which we have described and no others—that is to say that the single Judge will really determine the appeal (not merely hear it) except the case be a fit one for the grant of a certificate.

The Letters Patent of all High Courts should be modified on the lines of the most recent one, *i.e.*, the Letters Patent for the High Court of Rangoon. If it is thought necessary in any court to impose a restriction, the restriction should take the form of a prohibition against second appeals valued above a certain figure being heard otherwise than by a bench, but we are not in favour of inserting such a restriction into any Letters Patent. We think that it would be sufficient if such a provision were incorporated among the Rules of the High Court concerned together with the provision which all High Courts, we understand, already have permitting a single Judge to transfer a second appeal for hearing before a Bench.

CHAPTER 25.

Appeals.—Second Appeals by Leave.

We are of opinion that it is impracticable and undesirable to attempt to prohibit second appeals in all cases where the valuation of the suit is below a given figure but that it is necessary to provide for a stricter and better scrutiny of second appeals. The provisions of Rule 11 of Order XLI have to be read with sections 100 and 101 of the Code. Rule 11 is part of the series of rules applicable to first appeals and it has no special applicability to second appeals. In spite of the fact that a large portion of second appeals are summarily dismissed under this rule, we do not think that the rule is adequate or that it works uniformly or well.* That many cases are dismissed summarily is due to the fact that the appellant has in all cases to accept as final the findings of fact of the lower appellate court unless he can displace them by showing that they have been arrived at by a misreception of evidence or other error of law. A judgment on first appeal has in effect to fulfill the function not only of a reasoned judgment but of what is known to English lawyers as a "case stated." One consequence of this is that the lower appellate court tends to review the trial court upon questions of fact in greater detail than would be otherwise necessary, although most courts perforce agree that a judgment of affirmance need not discuss the facts so elaborately as a judgment of reversal. The tendency is to pay less deference to the findings of fact of the trial court than these findings deserve. The business of the appellant's pleader is to make out either that the judge on first appeal has wrongly determined a question of law argued before him or that he has proceeded upon improper evidence or that his statement of the legal criterion is inadequate or incorrect or that his statement of the correct form of the issue of fact is in some way open to objection. It is a great mistake to suppose that second appeals necessarily or even ordinarily turn upon a substantial question of law as distinct from mere criticism of the judge's procedure or of the correctness of his exposition.

2. In India the majority of cases affecting land or interests in land attain to a certain degree of complication, much of which is unnecessary, being caused by contentiousness or mishandling. To apply Order XLI, rule 11, it is necessary in general to read both of the judgments in the courts below. If much time is occupied in deciding whether to call upon the respondent or to dismiss summarily, the result will be that the appeal will occupy a substantial portion of the court's time twice over. Scrutiny under

* The proportion of second appeals summarily dismissed to the proportion of those instituted in 1922 varies from 16·58 per cent. and 19·22 per cent. in Oudh and Madras respectively to 39·75, 43·76 and 61·9 per cent. in Bombay, Bengal and the Punjab.

Order XLI, rule 11, is in general made to occupy a short time only. If a complete answer to all the appellant's objections to the judgment be not discovered with a limited amount of trouble the inevitable tendency is to hold that the appeal should be admitted and that it should be heard later in the presence of the respondent. In view of section 100 of the Code the court is not entitled to treat a case of no importance differently from a case of great importance. A zamindar who wants to argue some wide-reaching point of law may chose to raise it as against a small tenant holding on a *jama* of a few rupees and must be allowed to do so if the court cannot at once overrule his contention or say that the point does not arise.

3. The method of approach under Order XLI, rule 11, is not that the appellant having had two hearings already has to make out a case for special leave to appeal, to show that the ends of justice are better served by permitting the appeal than by refusing it. The question is whether having regard to section 100 of the Code the court considers that a point of law arises. In more recent times we think that a point of law is generally required for this purpose to be a point of law which the court is not prepared to dismiss forthwith as bad. Even so, it is to be noticed that in his note which the Chief Justice of Bombay kindly supplied to us he writes—"I found that second appeals were being admitted whenever it appeared that a point of law was involved, however obvious it might be that the decision of the lower court was correct." The great difficulty is the inability of the court to devote such time to the facts as to enable it without the assistance of any pleader for the respondent to determine whether the alleged points of law necessarily arise or not, and if so whether there is sufficient substance in the points of law taken that the court should not immediately overrule them. The position of the pleader arguing for the appellant under Order XLI, rule 11, is, we think, somewhat difficult. In the grounds of appeal will be found usually a substantial list of legal points and in from 30 to 60 per cent. of cases he is told at the end of his argument that there is no reasonable point of law at all.

4. We understand that a considerable number of people still regard Order XLI, rule 11, as an improper occasion for deciding upon the merits of any point of law, and one witness, representing a Vakil Bar and himself a practitioner of great experience, represented this opinion. He said:—"I think the way in which some judges examine the admission of appeals is the best—only just to see whether there is any *primâ facie* question of law for admission of the appeal. If that method is adopted in all courts business may be conducted more quickly. Fifty or sixty appeals may be decided, admitted or rejected in the course of the day. But, I know of instances in which twenty rulings were cited before the Bench sitting to hear these appeals." This view has always been acted upon by some Judges. The basis of it is that section 100 gives an appeal as of right and that accordingly no appeal can

be dismissed summarily, unless the court can discover upon mere inspection that it contains no reasonable argument capable of coming within the four corners of the section. Mr. Justice Rampini in 1900 described the position by saying that in practice only such appeals are dismissed under this procedure as clearly involve merely questions of fact and appeals in which points of law good or bad arise are admitted.

5. In 1897 six Judges of the Calcutta High Court were in favour of a provision to make a strict hearing under this procedure compulsory in the case of all second appeals. A minority consisting of five Judges including the Chief Justice were strongly in favour of the view that in no case should any second appeal be registered without leave, which would mean that the High Court, before admitting it, is satisfied that there is a good ground of appeal. In 1901 this question again came up before the High Court and on that occasion four Judges, including the Chief Justice, were of the opinion that it would be preferable to prescribe that in no case should any second appeal be registered without the leave of the Court. The majority of the Judges however, nine in number, did not agree with this opinion. They considered that the proposal to make the right of second appeal dependent on the leave of the High Court was open to objection because of the uncertainty of the standard to which the question of the admission of the appeals would be made referable, and that a standard which would be set up by a rule requiring for the admission of the appeal merely the leave of the Court would be too indeterminate and inconsistent. But we would remark that, as the law stands at present, Order 41, rule 11, sets no standard and even if registration of second appeals were only granted by leave, it would still be necessary to retain the provisions of section 100 of the Code. We think that in practice Order XLI, rule 11, is an insufficient protection to the respondent under a system which gives a second appeal on points of law in all cases not being of a small cause court nature and irrespectively of their value or importance. Before a second appeal is admitted and the respondent is put to substantial delay and expense for the third time the High Court should be satisfied that the interests of justice require further investigation of the case. A small case of great importance should receive due consideration from this point of view. The position of the parties, the carefulness of the judgment, the difficulty of the case, the concurrence or disagreement of the lower courts are elements to be regarded. In an ordinary case of small value, if it appears that the parties have had a fair and careful trial and that there is nothing *primâ facie* erroneous in the judgment, a second appeal should not be allowed merely in order that the law of the case may be applied to the facts for a third time in a spirit of abundant caution.

6. The discrepancy between the number of appeals admitted under Order XLI, rule 11, and the number that ultimately succeed

is too great and in many cases the process is too lengthy and elaborate to make justice possible. A contest between two auction purchasers, between a zamindar and his tenant, between two adjacent neighbours, between a judgment-debtor and a judgment-creditor can nearly always be made to furnish some legal point. A point of law as to which the judge is of opinion that the court below was as likely to be right as wrong is not in general sufficient to make it just that the respondent should have to fight his case afresh. The principle that our lower appellate courts cannot safely be trusted to decide any points of law (including herein points of procedure) if they show any degree of difficulty whatsoever, might well be abandoned. The real position is that the decisions of the lower appellate courts require scrutiny and supervision not because they are in general incompetent to do well and correctly the great bulk of their work, but because the interests of the parties and the interests of the State do not in India make it possible even in small cases to ignore the margin of error. Questions of law and questions of fact are notoriously difficult to disentangle from one another. To give an absolute right of appeal limiting it to questions of law and procedure as defined in section 100 is to put a premium upon abstract and technical discussions, to divide the duty of decision among too many people and to foster litigation. If second appeals were limited as at present by section 100, but within that limit were made subject to special leave, we think that the High Courts would in time succeed better than they now do in restricting these appeals to cases in which as a matter of common sense it is reasonable to permit them. Judges in India have by their training and experience sufficient ability to appreciate what is really involved in a case and have been so long brought up under a system of rights of appeal that they may, we think, be trusted not to stamp upon the smallest appeal if there is real reason to apprehend that the decisions of the courts below is not in substance just. What is wanted after all is justice and not the utmost degree of technical exactitude where this can only be had at a price which makes justice impossible.

7. It may well be necessary to provide carefully for a due consideration of all applications for leave. The judgments of both courts should be before the High Court. The record if required should be there for reference as it may be under Order XLI, rule 11. Grounds of appeal should be carefully detailed in the application. Applications should be listed and come on after due notice in an orderly manner. All this is done at present under Order XLI, rule 11. The application for leave should be stamped as a memorandum of appeal. The only difference we suggest is this, that instead of a second appeal being brought as of right and summarily dealt with only when no arguable point arises, the appellant should have to satisfy the court that on a point of law there is sufficient reason to think that the decision of the first appellate court is erroneous to make it necessary, in an endeavour to do justice with reasonable diligence as between appellant and respondent, that a

further investigation with its attendant consequences should be ordered. We see nothing in this change that would encourage haste, carelessness or arbitrariness in the lower courts. Under present conditions it appears to us to afford a chance of keeping down the number of second appeals which are admitted without reasonable probability of success and without any special importance to the parties. We think too that if the right of appeal be made contingent on the leave of the court there would be fewer unfounded applications and a feeling of less grievance upon the rejection of them.

8. One point of practice might be noted here. Applications for leave to appeal should, in our opinion, be heard before a court constituted in like manner as a court would require to be constituted in order to dispose of the appeals. In cases valued at under Rs. 1,000 it may well be that a single Judge should be empowered to deal with application for leave to appeal but that applications for such leave in all other cases should be disposed of by a Bench.

We consider, however, that this matter should be regulated by rules of the High Court and not by Legislative provisions. The only court in which, so far as we know, the duty of admitting some second appeals under Order XLI, rule 11, is entrusted to the registrar is the High Court of Patna. Under the system which we propose, leave to appeal would never in any circumstances be given except by a Judge or Bench of Judges.

9. The question arises whether the court in some cases might not grant leave to appeal only upon condition, *e.g.*, that the decretal amount should be paid into court or security given therefor. We would not make it impossible for the court to attach conditions to the grant of such leave but we do not think that such a power would frequently be exercised or ought frequently to be exercised. When an application is made for stay of execution conditions can clearly be imposed. It is no doubt true that an appellant without applying for stay of execution can continue for a long time to make all sorts of objections in execution. It is true also that while an appeal is pending it is in many cases not "practical politics" for a judgment creditor to take steps to enforce his decree risking the chance that the execution proceedings may come to nothing by reason of some sort of interference with the decree. Some appellants moreover have no assets which are known to the decree-holder. Others employ the time occupied by the appeal in getting rid of or in complicating the title to such assets as they have. For these reasons it may be reasonable, in some cases, to attach a requirement as to deposit of or security for the decretal amount as a condition of the leave to appeal, but as a rule an appellant who can show sufficient case to appeal cannot reasonably be deprived of his chance owing to inability to satisfy or to give security for the decree.

We do not think that the cases will be many in which the court giving leave to appeal upon points of law would think

it right to qualify the leave by such a condition. The question of security for the costs to be incurred by the respondent in resisting the appeal is, however, a different matter and we think that costs awarded in the lower court stand also on a different footing.

Note by Sir T. Desika Achariyar on Chapter 25.

I desire to express my inability to agree with the recommendation of my colleagues that in no case should a second appeal be admitted without the special leave of the High Court. While I quite appreciate the necessity for a stricter and more uniform scrutiny of second appeals than now obtains under Order XLI, rule 11, I have objection to the change proposed. No great expedition in the disposal of appeals or saving of business will result by making the registration of all appeals contingent on the grant of leave. The appellant paying the prescribed court fee as he would be required to do on the application for leave will be forced at once to engage a senior practitioner and in some provinces to have the essential records printed and to arrange for his case being presented as elaborately as is done now at the final hearing in the presence of both parties. This is bound to work hardship on poor litigants. The idea of appeals by special leave, though attractive, is somewhat novel to this country and is sure to evoke considerable public opposition, assuming as it does that second appeals cannot be admitted as of right. As long as no principles are laid down to guide courts in granting or refusing leave, no improvement on the existing investigation under Order XLI, rule 11, can be really effected by the proposed reform. If no reasons need be given for refusing leave and no appeal lies against such refusal, there will be no definite or uniform standard in the admission of second appeals and there is likely to be apprehension in the mind of the public that an attempt is made to arbitrarily reject second appeals.

I appreciate the position of the respondent who is dragged to the second court of appeal in many cases most unnecessarily, but it has also to be borne in mind that there are many appellants in second appeal who have been successful in the first court and unsuccessful only in the lower appellate court. The proposed rule to which I agree requiring the appellant to deposit the amount of costs awarded against him in the lower courts as well as the possible costs of the respondent in the appellate court, will, if adopted, prevent the filing of a large number of frivolous appeals.

T. DESIKACHARI.

2nd January 1925.

CHAPTER 26.

Appeals.—Security in Second Appeals.

We are of opinion that in every second appeal to the High Court the appellant should be required to deposit in court, in cash or in Government promissory notes, a definite sum by way of security for the respondent's costs of the appeal.

So far as the trial court is concerned it is necessary to maintain the principle that except for special reasons such as that the plaintiff resides abroad or that the plantiff is only a nominal plaintiff, poverty on the part of the plaintiff does not ground a right in the defendant to require security for his costs. It has not been sufficiently observed in India that the same rule does not hold good in the case of appeals; and when we come to second appeals, the rule is utterly unjust.

Here again it is necessary to emphasise the position of the respondent. We observe that in an opinion already quoted the Calcutta Judges in 1897 objected to a rule requiring security for costs unless the court for good reasons should dispense with security on the ground that it would give the rich litigant an advantage over the poor litigant and might cause delay and increase of work by disputes over security. The right of second appeal as it at present exists gives to a rich litigant a chance of tiring out the poor litigant even although there be little in his appeal. No procedure that can be devised will affect the rich and poor equally in the end. The aim should be to establish a system reasonably fair to appellant and respondent. Comparisons between rich and poor appellants are not much in point. If the position really is that the appellant in second appeal cannot find such sum of money as would suffice as security for respondent's costs of a second appeal, then to permit such an appeal is a serious matter. It is of course conceivable that the requirement of security might exclude a good appeal. It is perfectly certain that the failure to impose such a requirement will in many cases end in the failure of the respondent to recoup his costs. We consider upon the whole that it would much improve the standard of justice attained, if an inflexible rule were laid down that a definite and ascertainable sum should in every case be deposited in court to answer the respondent's costs in case such costs be awarded. We are not in favour of this requirement being made discretionary because we think *firstly* that applications in the presence of the respondent to dispense with security would be constantly made and would be an additional harassment; *secondly*, that in order to avoid too prolonged enquiry judges would constantly dispense with it in whole or in part. Nor in our opinion has any one a right to expect that his case will be heard for a third time—except upon the condition of giving such reasonable security. In the case of bankruptcy appeals in England the requirement of a fixed sum of £20 has

we believe, worked exceedingly well. If for second appeals in India the security was fixed at one single invariable sum, that sum would have to be small—so small as in some cases to be useless. We think that a very reasonable rule would be as follows—to require the appellant to deposit the amount of any costs awarded against him in the lower courts plus the amount at which the respondent if successful could tax his pleader's fee under the High Court Rules. The conceivability that it may work hardship in a rare case is as nothing against the certainty that its absence spells injustice in many cases. There would be nothing to prevent the court ordering further security for special reason; as to this neither the law nor the practice calls for any change.

CHAPTER 27.

Appeals.—Minor Amendments in the Law of Appeals.

Besides the above major reforms which we recommend there are certain minor matters dealing with the amendment of the Code which, in our opinion, would conduce to more expeditious disposal of appeals in certain cases in the High Court.

2. Under section 98 of the Code where two judges disagree as to whether a decree should be varied or reversed the decree is confirmed, but if the Judges of the Bench differ on a point of law they may state the point of law; and the appeal will then be heard on that point only by one or more other judges, and the point decided according to the opinion of the majority of the judges who have heard the appeal including those who first heard it. It is only therefore where there is a difference of opinion between two judges on a point of law and the point of law is stated that a reference to one single judge may decide the appeal.

3. Under the Letters Patent of the High Courts, however, where there is a difference of opinion between two judges the appeal is decided by the opinion of the senior judge, the rule of the Letters Patent, in view of section 4 of the Code of Civil Procedure, prevailing against the provisions set out in section 98. (Compare the Privy Council decision in Bhaidas Shivdas *versus* Bai Gulab 48 Indian Appeals 181.) But in such a case there is also under the Letters Patent a further appeal to a Bench of Judges. It appears to us that it would make for reduction of work in the High Court if in all second appeals, *i.e.*, appeals from appellate decrees or orders, the provisions of section 98 of the Code should apply and not the provisions of the Letters Patent.

4. Section 103 of the Civil Procedure Code was introduced into the Code in 1908 to meet certain rulings to the effect that under the old Code the High Court had no jurisdiction to decide any question of fact with the result that even on petty matters remands had to be made if any small question of fact had been left undetermined by the lower court. This section has been useful to a certain extent in preventing unnecessary remands, but it restricts the power of High Courts to determine issues of fact to those issues which have not been determined by the lower appellate court. A finding of fact, however, of the lower court may have been come to owing to misreception of evidence or other error of law. There seems to us no reason why when the High Court has set this misreception of evidence or error of law right in appeal, it should be necessary for the court to remand the case after framing an issue for reconsideration of the evidence of fact under Order XLI, when it could well and with greater expedition come to the necessary finding of fact itself. In this connection we would also refer to Order XLI, rules 23 to 29. The amendment therefore that we

propose is on the following lines, in substitution of the existing section.

"Where in any second appeal it becomes necessary for its disposal and for the avoidance of a remand that any issue of fact be determined either because it has not been determined by the lower appellate court or because the finding of the lower appellate court is vitiated by an error such as is described in section 100 (*1*), the High Court may if the evidence on the record is sufficient determine such issue of fact."

5. We have already recommended in Chapter 7 that the limit of five hundred rupees given by section 102 of the Code should be raised to one thousand rupees.

CHAPTER 28.

Revision.

1. The revisional jurisdiction of High Courts in civil causes is, in practice, exercised under two different statutory provisions, *viz.*, section 25 of the Provincial Small Cause Courts Act and section 115 of the Civil Procedure Code. Theoretically, the jurisdiction is derived under the Government of India Act, and under the provisions of the various Letters Patent.

I

2. As regards revision under section 25 of the Provincial Small Cause Courts Act (IX of 1887), we have already pointed out that this serves to render practicable and safe a system whereby many thousands of cases are committed for final decision to the lowest grade of courts. Thus, for example, the total numbers of small causes tried in 1922 under the Provincial Small Cause Courts Act in Bengal and Madras were 165,426 and 189,034 respectively. Of these 15,248 and 39,115 respectively were decided upon contest.

The language of section 25 is as follows:—

"The High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as it thinks fit." In this section the most important word is the word "may" which is used first to make it a matter of option or discretion on the High Court whether to "call for the case" or not. Of almost equal importance and simplicity is the phrase "according to law"—a phrase which we understand to be intended in the widest and most general sense.

No one supposes that the High Court is intended to be, or could possibly undertake the duties of, a court of first appeal from the decisions in so large a mass of cases. The provisions of Order V, rule 5 and Order XX, rule 4, of the Code show that small causes are to be decided in a summary fashion and that the reasons for the decision are not required to be set out in the judgment. "Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon." The materials requisite for an appeal are not intended to be obligatory. Moreover any right of appeal that could be intended in such cases would hardly be given to the High Court but would presumably be given to the district court as in the case of appealable orders (see section 24).

3. We mention these matters because we think that section 25 gives an overriding power the presence of which does much to justify the placing of final powers in the hands of the lower courts,

but that, if it is not very sparingly applied, it readily becomes an engine of oppression against respondents successful in the Small Cause Court, and a copious source of rank injustice by bringing small cases up to the highest court at the cost of inordinate delay, trouble and expense. We think that there is a tendency in some quarters to regard section 25 as though it gave a right of appeal on points of law much after the manner of that defined by section 100 of the Code. This appears to us to be an error and in practice a grave error. When a right of interference is given to the High Court that right is doubtless given for the benefit of litigants in proper cases but the power of revision is an extraordinary power vested in the highest court to control directly the lowest grade of court trying the smallest and simplest and most numerous classes of case. The materials intended to be available are of the scantiest and are insufficient altogether in most cases for the purpose of an appeal whether on fact or law. It seems fairly clear that the wide discretion given by section 25 is given as an *ultima ratio*, a security held in reserve against the sort of injustice and illegality that can be detected from a mere summary record. The most important decision to be taken in any particular case is the decision whether the case shows such *primâ facie* ground for believing that there has been a miscarriage of justice as to make it necessary that the respondent should be called upon to defend his decree in the High Court. This discretion should never be exercised save by a Judge of the High Court. The Judge is not called upon to affirm the decree of the court below or to answer all possible objections to it; he is called upon to say whether by reason of the conduct or decision of the court below there is in his opinion real, special and substantial ground on the materials before him for requiring the case to be decided in the High Court notwithstanding that by its nature and value it is intended by law to be determined without right of appeal by a Court of Small Causes. In deciding whether to issue notice to the respondent he is, one would suppose, obliged to bear in mind the scantiness of the materials placed before him at the *ex parte* stage, and the presumption that the judge in the court below was right. He cannot, one would think, fail to feel the force of the consideration that in small money claims the moment the plaintiff (for example) has to defend his decree in the High Court, then whatever the result, there is small chance of justice, inasmuch as the trouble, delay, and irrecoverable costs are likely to nullify the benefit to him of his decree and to leave him wishing that he had never sought justice from the courts at all. We hope we may be allowed to say without offence that we believe there are Judges who consider even under section 25 that if on a Small Cause Court judgment a point of law can be raised which they are not prepared to dismiss forthwith as bad, they ought to issue a rule on the respondent to show cause why his decree should not be set aside. We would most earnestly submit that practice on such principles is both shortsighted and disorderly. The very worst misconception possible with regard to section 25 is the notion that

such applications in revision should be examined as second appeals are examined under Order XLI, rule 11. The appellant in second appeal has a right to the decision of the High Court on any point of law which necessarily arises; his appeal cannot be dismissed without rejecting one or more of his contentions on such points. The applicant in revision has to show why the High Court should call for the case at all.

4. Doubtless when all the mischief has been done, when the respondent has been served with notice, has come up to the capital of the province and engaged vakils; when months have elapsed and the revision case is prepared; the court on the hearing of the rule may almost as well in many cases try the case out itself at least on points of law. If the court below is shown to have been wrong in law, it seems idle *then* to vouch a judicial discretion as a ground for refusing to interfere. Interference is presumably just and there is no miscarriage of justice so far as regards the High Court's treatment *of that case*. But the evil of the practice of treating section 25 as giving in effect a right of appeal on law is apparent in the much more numerous cases in which respondents are vexed and delayed for naught. The policy of the law is that there should be no appeal (this for the most cogent reasons): not even—in these small cases to the district court: not even on a point of law. The High Court can doubtless decide some cases better than the Small Cause Court; but the system whereby small cases are summarily decided without appeal on law or fact will give, year in and year out, better justice than a system of appeals. If in order to effect a certain amount of good in a comparatively few cases, the respondents in a large number of cases are hauled up to the High Court, then it may be said with some confidence that section 25 does much more harm than good.

5. We have found it impossible to collect from the statistics in the various administration reports figures showing under section 25 how many applications were made, in how many cases notice was served on the respondents, in how many cases the court felt obliged to interfere and the average duration of a revision case. One of the first reforms as regards statistics which we would recommend is that such information should be annually collected and published both as regards this form of revision and as regards revision under section 115 of the Code. Without this, it is impossible for any critic, for the Legislature or even for the court itself to form a reasonable judgment as to whether those powers are or are not an advantageous form of jurisdiction and whether they are being understood in the same way and applied in the same spirit in different courts.

6. When in Madras we had our attention called by some of the witnesses to the manner in which section 25 is worked in the Madras High Court and we were able to obtain certain statistics bearing on that matter. We would observe that we are not entitled

to say or prepared to say that this High Court is any less successful than other High Courts in exercising this very difficult and special jurisdiction and we appreciate that the learned judges in Madras may prefer their own views as to the correct scope of section 25 to those above expressed. We think, however, we may be allowed to say quite frankly that the system whereby these applications in revision are dealt with by the deputy registrar seems to us to be mistaken. We have endeavoured to explain why we consider that the decision that it is necessary to serve the respondent with notice is the all important decision; the exercise of a high and special power intended as an ultimate security against imminent risk of injustice. Now, in Madras we were informed that such applications go to the deputy registrar, that he " admits " those which he thinks clear, and has those which he thinks doubtful posted for " admission " before the court (under Order XLI, rule 11 or the analogy thereof). The court fee paid on each application is two rupees. When an application is once " admitted " in this sense, *i.e.*, notice has gone to the respondent to show cause, we understand that the documents are printed. A hundred cases of the year 1922 were taken and examined in the office of the High Court for the purpose of giving information to the Committee. It was found from these that the average time taken in disposing of these applications was 396 days, and the percentage of success was as follows:—successful 31 per cent., partially successful 6 per cent., failed 63 per cent. In 1923 of 579 applications under section 25, 115 were dismissed under Order XLI, rule 11.

7. We may be allowed to observe upon these figures that the delay and expense involved to respondents in the cases that were not summarily dismissed is wholly inconsistent with justice in cases of small money claims. We consider that the only justification for vesting a direct control over such cases in the High Court is that the High Court alone could be trusted in practice to distinguish between the discretionary powers of section 25 and a right of appeal on law. We would submit that no notice should go to any respondent unless a Judge of the High Court has been satisfied that the decision of the court below is such as to call for the exercise of the special powers vested in the High Court; and that to base this conclusion in anything like an ordinary case very plain danger of injustice should be apparent from the record. It was suggested to us that in Madras it is considered by certain people that the right to revision should be converted into a right of appeal, that the appeals might go to the district court and that they should bear a proper court fee instead of Rs. 2 only. The question of court fee is an independent question. In the Punjab we understand that applications in revision have now to be stamped as appeals. We have no objection to this but we consider that the " right " to revision is entirely different from a " right " of appeal, that the policy of the law to have no appeals is in these cases entirely justified, and that the exercise

of the power of revision should be such as to safeguard, not nullify this policy.

8. On the whole we think that the jurisdiction under section 25 of the Provincial Small Cause Courts Act is defensible in principle though difficult and delicate by reason of the special desirability of extreme caution in the granting of rules, and that better steps should be taken throughout India to keep returns showing how the jurisdiction is in fact exercised. The natural tendency of the Bar pleading *ex parte* for "admission" is to widen unduly the scope of the section; individual characteristics of individual Judges will not seldom be on the same side. The absent respondent will always have many factors operating against him—the love of abstract talk about "justice" as though justice were independent of time, money and effort—the ready suspicion of arbitrariness or caprice on the part of the lower court, over-conscientiousness, sheer love of interference, amiability, disorderliness of mind, inability to grasp the intention of the legal system on broad lines and as a whole. It is therefore of paramount importance that each High Court should be put in a position to know year by year the broad facts as to the way in which its powers are being exercised and to appreciate roughly the amount of harm done by it under the section as well as the amount of good.

9. It has in many quarters been suggested that revision under section 25 should not be allowed to a defendant save upon his bringing into court the decretal amount or to a plaintiff save upon his bringing into court the costs awarded against him in the Small Cause Court. Under section 17 of the Provincial Act (IX of 1887) an applicant for an order to set aside an *ex parte* decree or for a review of judgment has to deposit in court the amount due from him under the decree or give security for compliance with the judgment or decree. We believe these conditions are admitted on all hands to have made for justice and indeed to be highly necessary to prevent gross abuse; we have some difficulty in seeing why an application asking for the special interference of the High Court should not be subjected to similar conditions. If sixty per cent. or anything like that number of the applications made are ultimately to fail it would seem more consonant with justice that deposit should in all cases be required. The number of applications which would thereby be rendered impossible but which now are brought and won is probably microscopic in any Province. The number of *mala fide* or useless applications which would be prevented would in every Province be substantial. Any rule requiring a deposit would have, we think, to be rigid; otherwise the effect would be to harass our respondents further by applications to dispense with the deposit. We think that it is much more necessary that the law should be amended so as to give some little protection to the respondent than that it should be amended to increase the receipts from court fees. It is not however necessary that the full amount of the

decree should in all cases be deposited by defendants and we think that even if the Small Cause Court jurisdiction be raised to Rs. 1,000 the amount of the compulsory deposit should be limited to Rs. 400, without prejudice to the right of the Court to require deposit of the whole amount if it thinks fit. It would be essential in our opinion that the deposit should be made with the filing of the application and not merely after a *rule nisi* or its equivalent has been granted.

10. It should here be observed that mere security for respondent's costs of the application is not enough and that unless the condition as to deposit is made a real security to the respondent for his claim, the present procedure had better be left alone, since the knowledge that some security is required will tend to obscure still further the duty which the court owes to the respondent when deciding as to the issue of a rule. We further consider that deposit in cash or Government promissory notes should be required in order to avoid squabbles over security and the very considerable risk of security having to be enforced by subsequent proceedings. The only practicable basis for Small Causes Court procedure is a cash basis. It is for the applicant to arrange a loan on his property if necessary; not for the court to require a respondent to accept it as a sufficient security.

II

11. Revision under section 115 of the Code is of a special character and is constantly attended by difficulties of its own. The jurisdiction is derived theoretically under the Government of India Act and the various Letters Patent from the authority of High Courts over mofussil courts, an authority which comprises a power of " superintendence " as distinct from appeal proper. It has not always been accepted law that the High Court's powers of revision in cases to which section 115 of the Code applies are limited to the powers conferred by the section. In 1900 Mr. Justice Rampini recorded a minute in which he pointed out that in some cases even apart from section 115 the Court will certainly be asked, and may even be induced, to exercise its undefined powers of " superintendence " under section 15 of the Charter Act. He continued: " It has been held by a Full Bench of the Allahabad High Court that this section confers on the High Court only administrative, and not judicial powers (Tajaram *versus* Harsukh, I. L. R., 1 Allahabad, 104) and by the Calcutta High Court that it confers powers of interference only in matters of jurisdiction (*In re* Lukhy Kant Bose, I. L. R., 1 Calcutta, 180; Ram Lal Singh *versus* Janki Mahatan, 4 Cal. L. R., 14). This view of the extent of the powers of the High Court under the Charter Act seems to have been approved by their Lordships of the Privy Council in Nilmoni Singh *versus* Tara Nath Mukherji, I. L. R., 9 Calcutta, 295, and 9 I. A., 174. But recently both the Allahabad and Calcutta High Courts appear to have extended their jurisdiction under

section 15 of the Charter Act, and to have exercised under that section powers other than those of a merely administrative nature and in matters involving questions other than those of jurisdiction (Abdullah *versus* Salaru, I. L. R., 18 Allahabad, 4; *in re* Siddeswar Boral, 4 C. W. N., 36). The rulings of the Calcutta High Court in Hurbullubh Narain Singh *versus* Lachmessar Pershad Singh (I. L. R., 25 Calcutta, 188) and Laldhari Singh *versus* Sukdeo Narain Singh (I. L. R., 27 Calcutta, 892) illustrate the tendency of the Court, when its revisional jurisdiction is excluded by legislative enactment, to enlarge its powers of 'superintendence.'"

12. Moreover, we understand that in some High Courts Section 151 of the Code is by some process of fallacious reasoning regarded as enlarging the powers of the High Court in revision. For these reasons it would, we think, be convenient if it were laid down that the power of revision did not extend beyond the limits of section 115 of the Code, save and except in cases where special statutory provision is made to the contrary (as for example by section 25 of Act IX of 1887). We conceive that it would be competent to the Indian Legislature to interpret or amend the Letters Patent in this sense, also that it is always open to His Majesty to make such amendments as a matter of prerogative. The amendment proposed would in effect be declaratory in respect that it would coincide with the better opinion as to the existing law, but it is very necessary that any room for doubt or haziness as to the necessity to pay strict attention to the terms of section 115 of the Code should be carefully excluded as it is productive of great confusion.

13. A main difference of opinion on the section is as to whether interlocutory orders are intended to be covered by it, or whether the intention is that after the whole case has been disposed of by a court, the High Court should then and then only have the right to interfere in revision. The view taken by the High Courts at Allahabad and Lahore is that the section does not warrant an interference during the pendency of any case. The view taken, however, in Calcutta and elsewhere is that under the section the court has a discretion to interfere even although the case in the court below has not been disposed of completely.

14. Apart from this question section 115 has undoubtedly been productive of much bad law by reason of the tendency on the part of High Courts to interfere with every order which they do not regard as correct. The section reads as follows:—

> The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—
>
> (*a*) to have exercised a jurisdiction not vested in it by law, or
>
> (*b*) to have failed to exercise a jurisdiction so vested, or
>
> (*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit.

The Privy Council by their decision in Amir Hassan *versus* Sheo Baksh, I. L. R., 11 Cal. 6, have interpreted the section so as to narrow its scope much more strictly than is represented by the general practice of Indian High Courts. It is frequently very difficult to determine whether an error in law amounts or does not amount to "acting illegally" or in interlocutory matters to "material irregularity." The way in which the section is interpreted and applied varies very widely between one High Court and another and between one Judge and another. It is noticeable that Courts when they are not minded to interfere in revision are very apt to insist upon the narrow limits of the right; though in the face of an order or decree which seems plainly erroneous the limits of the right are without difficulty overpassed. The position would seem to be that when the High Court ultimately interferes under section 115 its action has a very good effect, though in many cases the interference is beyond the terms of the section.

15. Bar Associations and others have sometimes represented that the right to interfere in revision should exist wherever there is an error of law. They appear to have difficulty in understanding why there should be any limit to the right of revision. The real question is with regard to those cases where the High Court does not in the end decide to interfere. A certain number of applications are made to the Court. In certain of these the Court issues a rule calling on the respondent to show cause. After a time—more or less long—the rule is heard and the court makes up its mind whether to interfere or not. If in order to effect a certain amount of good in a few cases a large number of respondents are harassed and proceedings in the lower courts are hung up for a substantial period of time, then the section does more harm than good. This is the certain result indeed if the court is uncritical or liberal in the granting of rules which are fated ultimately to come to nothing.

16. It is very difficult to determine with reference to each High Court whether on the whole this jurisdiction is an advantage or a disadvantage. The statistics which are compiled for the purposes of administration reports are completely useless for the purpose of founding an opinion on this subject. One eminent Chief Justice has expressed the opinion that this revisional jurisdiction should no longer exist, its place being taken by a mere right of prohibition. It seems fairly clear that unless the greatest care is taken to ensure that a rule to show cause should never issue save where it is absolutely necessary, and unless rules, when granted, can be disposed of in a reasonably short time, revisional jurisdiction must in all probability be doing more harm than good upon the whole.

17. On the question whether interlocutory orders should be subject to revision, the time taken to dispose of a rule is the all important matter. Every such rule granted will have the effect

of staying proceedings in the lower court and many such rules will be applied for and obtained for the purpose merely of delay. If, for example, a rule once granted is not likely to be disposed of for eight months, then it is plainly better on the whole that interlocutory orders should not be subject to this form of attack. Assuming that a reasonable degree of expedition in dealing with this class of business can be attained it seems inadvisable to exclude interlocutory orders altogether. Where a lower court has affirmed its own jurisdiction to deal with a particular matter, it is much better that its error, if any, should be capable of correction immediately under this section, than that the case should be allowed to proceed to decree and should thereafter be dealt with on appeal. It is true that some interlocutory orders are made appealable (*vide* section 104 and Order XLII, rule 1), and it would no doubt be possible to extend the list of such orders to cover those of the type now in question. But an appeal as of right in all such cases would be no improvement whatsoever upon an application in revision. An application in revision has or should have to undergo scrutiny by the court before it results even in a *rule nisi*. If one may postulate that *rules nisi* are not granted except upon very careful examination and strict scrutiny, that the record of the lower court is not sent for unnecessarily, and that rules when granted are disposed of with expedition, then, on the whole, interlocutory orders affirming jurisdiction should not be excluded from the scope of the section.

18. When judges act upon the view that it is competent to revise interlocutory orders, but that this is a form of discretion which requires to be exercised with care, vigilance and strictness, and that it is all important to exercise judicial vigilance at the earliest moment, namely before a *rule nisi* is issued, and to insist upon expedition in disposal, we are not prepared to say that the section works with special ill-effects so far as interlocutory orders are concerned. It is not, however, possible to get all judges to act effectively on these lines. Moreover, it is intolerable that different High Courts should go on differing upon this subject, and it is much better that the legislature should impose a uniform rule on grounds of convenience rather than that judicial decision should make a rule by construction of doubtful words.

19. We would recommend that the right of revision should in the case of interlocutory orders be confined to cases of the kind contemplated by the first clause of the section—that is to cases where the lower court appears to have exercised or *to have decided to exercise* a jurisdiction not vested in it by law. In cases coming under clause (*b*) of the section we think that a right of interlocutory interference is unnecessary. We think that in cases contemplated by clause (*c*), interlocutory interferences are attended in practice with too great risk of injustice and delay caused by rules which have ultimately to be discharged. This matter has to be regarded throughout not merely from the point of view of the ultimate decision of a rule, but more especially from the stand-

point of the application for the *rule nisi*. The source of most difficulty under the section is in the two phrases " material irregularity " and " acting illegally." An error in law which seems to be very plain and to operate very unjustly is constantly brought under one or other of these descriptions without further enquiry. If it is an interlocutory order, it is treated as a " material irregularity"; if it is a final order it is "acting illegally." This for the purposes of the ultimate decision in revision is bad enough; for the purposes of the application for a *rule nisi* it is very apt indeed, especially on interlocutory points, to lead to rules being granted which in the end have to be discharged.

20. There is a special reason why interlocutory orders should not be revised under clause (*c*) before the conclusion of a case—*viz.*, that the materiality or immateriality of any error is best judged at the end of the day and in the light of the events that have happened. Many an applicant for revision would in the end—apart from revision—have succeeded completely in the lower court. In the great majority of cases an irregularity is probably immaterial in the end: it is easy to see in most cases that it may be immaterial, but it is practically impossible to predicate in advance that it is immaterial. We have thought it our duty to consider as to these two phrases, *viz.*, " acting illegally " and " material irregularity " whether any alteration of the wording of the section could be proposed which would have the effect of affording to the courts a more workable boundary line within which the section should be confined. We think that it is highly anomalous that a wrong decision upon limitation or on *res judicata* should fall outside the section but that a wrong exercise of discretion as to whether the plaintiff or the defendant or a witness should be allowed to be examined on commission should fall within the section. A wrong exercise of discretion with respect to a matter of procedure is not reasonably called a " material irregularity " (still less is it " acting illegally ") within the meaning of the section. We consider that an explanation might be added to this effect under clause (*c*) of section 115, not—we would repeat—because we doubt that High Courts, if they finally decide to interfere upon such points, would not be acting in the particular cases in the interests of justice, but because we consider that in too many cases High Courts would feel obliged to grant *rules nisi* which ultimately would fail after serving the purposes of delay and harassment. We think the explanation which we suggest will do a great deal to keep clear the real intention of the section.

21. It is impossible to define the word " case " used in section 115 of the Code. It is not a term of any precise signification. Sir Shadi Lal, Chief Justice, in a recent case, Lal Chand Mangal Sen *v.* Behari Lal Mehr Chand (I. L. R. 5, Lahore, 288—292) observed: —

" The judgments of the High Courts in India, which have been cited at the Bar, reveal a great divergence of judicial opinion, and there can be little doubt that the decisions of the judges in several

cases were influenced by their desire to avoid the possibility of grave injustice which might result from placing a strict interpretation upon the word " case " as used by the Legislature. Neither the Civil Procedure Code nor the General Clauses Act defines the expression " case," and there is no other Statute which can throw any light upon the subject. It is beyond question that " case " is not synonymous with " suit." While every suit is a case, it cannot be said that every case is a suit. The word " case " is a more comprehensive expression and includes not only a suit but other proceedings which cannot be described as a suit, *e.g.*, proceedings under the Guardians and Wards Act, Probate and Administration Act, Succession Certificate Act, Provincial Insolvency Act, Religious Endowments Act, etc. But can a branch of a suit be regarded as a case within the meaning of the section?"

We think that the section should be revised so as to eliminate the word " case." Apart from suits and proceedings in execution it seems to us that error is well guarded against by the provisions of the law as to appeals and that there is no need to provide for any right of revision against orders made in the special jurisdictions referred to by the Chief Justice save in cases in which a court is proposing to exercise a jurisdiction which does not belong to it. We would accordingly remodel the section by basing it upon the well defined distinction between " decrees " and " orders " as was suggested to us by the Chief Justice of Bombay. The following is our suggestion to the draftsman :—

SECTION 115.—(I) " The High Court may call for the record of any suit or proceeding in which a decree or order has been made by a court subordinate to such High Court, from which decree or order no appeal lies thereto.

(II) (*a*) In the case of any such *decree* as is referred to in sub-section (I) if the subordinate court appears—

(1) to have exercised a jurisdiction not vested in it by law, or

(2) to have failed to exercise a jurisdiction so vested, or

(3) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order as it thinks fit.

(*b*) In the case of any such *order* as is referred to in sub-section (I), if the subordinate court appears to have exercised or to have decided to exercise a jurisdiction not vested in it by law, the High Court may make such order as it thinks fit."

Explanation.—(1) An erroneous exercise of discretion in a matter of *procedure* is not acting illegally or with material irregularity within the meaning of clause (3) of sub-section (II) (*a*).

Explanation.—(2) Any finding or decision as to the jurisdiction of such subordinate court is an order within the meaning of this section.

CHAPTER 29.

Execution of decrees and orders. Causes of delay. Remedies. Some proposed amendments in the Law relating to execution.

1. In 1872 Sir James Colville, delivering the judgment of the Privy Council in the Maharajah of Dharbhanga's case (14, Moore's Indian Appeals 612) said that " the difficulties of a litigant in India begin when he has obtained a decree." Before and after, eminent judges in this country have used the same or similar language. In the letter of the 28th June 1923 addressed from the Home Department of the Government of India to local Governments referred to in the introductory chapter of this report, it is stated, as regards execution of decrees:—" It has been found impossible to prepare any statement in a compendious form which will show the results obtained. It is clear, however, that there are substantial facts to support the common criticism that litigants are unable to gain adequate satisfaction for the decrees passed in their favour. Thus, taking the figures reported by provinces in 1921, it will be found that Bengal mofussil courts returned execution proceedings as infructuous in no less than 245,344 cases, the percentage of totally infructuous in some districts being as high as 71 and 63 per cent. In the same year the mofussil courts of Madras except village courts obtained satisfaction in full in only 16·56 per cent. of the applications for execution, and satisfaction in part in 7·19 per cent. while the number of totally infructuous applications was 239,421. The courts subordinate to the Allahabad High Court dealt with 141,639 applications for execution of decrees; and of these 57,711 were totally infructuous. Those subordinate to the Lahore High Court dealt with 174,566 applications of which 83,902 were returned as totally infructuous. Out of 139,742 applications before the courts in the districts of the Central Provinces and Behar 66,286 were returned as infructuous."

2. It would seem from this that the Indian litigant has not only to wait unduly for his decision but has even afterwards to put up with ineffectiveness and delay in execution, and that Coke's ancient apothegm " *executio est fructus, finis, et effectus legis* " expresses only a pious hope in India. There is, however, reason to believe that the condition of affairs is not so bad as these figures might lead one to suppose. The evidence recorded by this Committee has confirmed, what the first witness examined by it (Mr. Mackay) stated, that these figures as to infructuous execution are misleading. Execution petitions are returned as infructuous even when the matter has been settled out of court and full satisfaction has been obtained, if this fact has not been brought to the notice of the court by either party. There are also applications in which a certain amount of satisfaction is

obtained, as where a decree-holder takes out an arrest warrant and after receiving a few rupees from the judgment-debtor gives him time to pay the rest. This payment may not be deducted from the amount decreed, but still the application has not been in vain altogether from the point of view of the decree-holder. In such cases it seldom happens that the judgment-creditor reports the payment to the court: indeed the report to the court is usually that the judgment-debtor was not present or had not been found. Further, many execution petitions are filed merely to satisfy the requirements of the law of Limitation, according to which a decree has to be " kept alive " by applications every three years. In such cases the decree-holder does not proceed with the application and never intended to do so. Many other applications are included in the list of fruitless petitions which are really no applications at all. They were returned for correction of clerical errors and were not resubmitted after correction, but were superseded by new applications.

The ever-increasing number of persons who come into court with money claims asking for money decrees is an indication that the Indian judicial system is working more successfully than the figures above mentioned seem to show; for, if the vast majority of proceedings resulted in no satisfaction, it would be extremely strange that people who have already parted with money should care to spend further money in obtaining a worthless piece of paper.

3. Still it is plain enough that there are special difficulties in the way of judgment-creditors in India. Some are not removable; others are imposed as part of deliberate public policy, *e.g.*, those laid down in the interests of agriculturists by such laws as the Deccan Agriculturists' Relief Act and the Punjab Land Alienation Act. We do not consider it to be for us to express an opinion as to the necessity for or the merits of this legislation which involves matters of policy beyond our scope. It is certain, however, that it delays and obstructs certain classes of decree-holders and it is idle to revile the court for carrying out the intentions of the legislature. Many of the decree-holder's difficulties are, however, removable, and if " execution is the life of the Law and therefore in all cases to be favoured " (Bac. Abr.), these should be removed. The Law has provided so many safeguards against abuse of execution proceedings that such proceedings have become unduly cumbersome and ineffective. It is eminently necessary to protect honest creditors seeking to put in force the different classes of decrees. To adopt the language of the Rules of the English Supreme Court, decrees are principally (1) for the payment of money, (2) for the recovery or for the delivery of possession of land, (3) for the recovery of any property other than land or money, (4) ordering any person to do some act other than payment of money or to abstain from doing something. Under the first class come what in India are called " simple mortgage decrees," that is, decrees for the realisation of money charged

on immovable poperty by the sale thereof. In the second class are included other mortgage decrees such as those for foreclosure or redemption; and under the fourth head will be classed decrees for specific performance of contracts and execution of instruments. These cover nearly all the classes of decrees which come up for execution in Indian courts. In the case of each of these classes there are special circumstances which lead to delay; but these are few compared with the considerations which are generally applicable to all classes of decrees. Before proceeding to consider those special difficulties it will be well, therefore, to advert to such general considerations.

4. Not a few of the difficulties in execution are due to circumstances anterior to the decree. A large number of money decrees prove infructuous, not because there is anything vicious or cumbersome about the system of execution, but because of the simple fact that the judgment-debtors were never able to pay what they borrowed. Money-lenders in India often lend money to persons who, even at the time of borrowing, had little or nothing from which they could hope to repay the loan. The attraction of a high rate of interest is not seldom too strong for the ordinary mahajan to resist, and leads him into lending money without proper security. And in the fact that he sometimes recovers from one or two persons an enormous amount of money for the little that he lent lies, perhaps, the secret of this apparent want of prudence. The granting of credit improvidently is not a practice confined to the Indian mahajan alone. Even well established English firms have been known to enter into contracts with Indian merchants for the sale of goods worth large amounts without making proper enquiries as to their financial stability and without taking the precaution of a guarantee from a person whose solvency is beyond dispute. Several cases of contracts for the sale of piece-goods which came to grief in or about the end of 1920 were of this description. In such cases no system of procedure, however perfect, can be of any use in enabling the decree-holders to realise the fruits of their decrees, for there have never been any fruits to be gathered. In drawing inferences from figures as to infructuous decrees, one has to make a large allowance for this class of decrees and for the decrees obtained at some considerable cost on the off-chance of making something on a future day from a judgment-debtor, who has nothing.

5. Yet another factor to be taken into consideration is the system which allows a judgment-debtor to plead an anterior agreement not to execute the decree. There was a time when such agreements could not be pleaded in bar of execution. But there is recent opinion in favour of their admissibility; *vide* Chidambaram Chettiar *v.* Krishna Vathiar (I. L. R. 40, Madras, 233), and we not infrequently have the strange spectacle of a judgment-debtor seriously saying that he deliberately allowed a court to waste its time and solemnly pass a decree, which was to be absolute waste-paper, as he and the plaintiff had agreed that, if a decree be passed,

it should not be executed. Such an agreement need not even be in writing and the defendant can examine any number of witnesses on such an averment and thus harass his opponent. We would recommend that the law should be so altered that such agreements shall not be provable in bar of execution.

6. Another source of delay in execution is the defective drafting of decrees. Though the Code itself has prescribed certain forms for certain classes of decrees, it is common experience that except in the case of money decrees those forms are not often followed, partly for the reason that they are inadequate and do not cover many classes of cases which come before the courts. Apart from that, the persons who are entrusted with the task of drawing up decrees are too often men who have not had sufficient training in such work. In most mofussil courts where the vast majority of decrees are drawn up, the work is entrusted to a low-paid clerk, who generally has little knowledge of the Civil Procedure Code, and still less of other authority. His draft is passed mechanically. Though the Code requires the judge to satisfy himself before signing the decree that it is in accordance with his judgment, experience shows that this is rarely done, probably because the judge has little time for the purpose. The result is that troubles arise when the execution petition comes in. The defendant is often able to take objection successfully to defects in form.

7. Attempts have been made in some provinces to get over this difficulty and to ensure the proper drafting of decrees in various ways. In Bihar and Orissa the following rules have been made:—

"Decrees shall be prepared under the supervision of the Sheristadar of the court who shall initial the same."

"As soon as a decree has been drawn up, the court shall cause a notice to be exhibited on the notice board stating that such decree has been drawn up and that it may be perused by the parties or their pleader within three days from the date of posting the notice."

"When such notice has been posted, any party or his pleader may before the expiry of the time prescribed in the last preceding rule peruse and either sign it or if it is incorrectly prepared bring the matter to the notice of the court." A similar rule applies to the Allahabad High Court. In Bengal the rules run thus:—

"The pleaders on both sides shall be required to affix their signatures to the decrees of the mofussil courts before they are signed by the judge. Where a pleader has not signed the decree, the cause of his failing or refusing to sign shall be certified on the decree."

The Central Provinces rule is identical. In Bombay the rules go a little further and run thus:—

Appellate side rule.—"Before decrees are signed they shall be attested as being correct according to the judgment by the parties or their vakils."

Mofussil rules.—"In cases in which pleaders are employed, it is their duty to see that decrees and final orders are properly drawn up in conformity with the terms of the judgment, and every facility should be given them for that purpose and for being heard on the subject in cases of doubt and difficulty. Except in the Courts of Small Causes at Poona, Ahmedabad, Nadiad, and Surat, the pleaders should be required to affix their signatures to the decrees before they are signed by the judges. Where any pleader has not signed the decree, the cause of his failing or refusing to sign should be certified on the decree."

8. We think that in all courts the pleaders of the parties should have an opportunity of taking exception to the form of the decree as not correctly carrying out the true effect of the judgment. The pleader of the party who has lost may not be anxious to place the decree above cavil but may prefer to retain the defects in it with a view to utilize the defects in the appellate court. Still the rules requiring pleaders to sign the decrees when they are satisfied that they are in conformity with the judgment seem to us useful. We consider that they should be adopted in all provinces and that in any case in which objection to the form of the decree is not taken at the proper time in this manner the parties should not, without special leave to be given only for special reason, be permitted to raise, by means of an appeal, the question whether or not the decree has been correctly drawn up. If any objection is taken to the form of the decree and is over-ruled, then necessarily the matter can be reopened in appeal. It seems to us reasonable that objections to the form of the decree should ordinarily be excluded unless they are raised at the proper time. If the pleader does not sign the decree the position should be the same as if he had, unless he has taken his objection at the time.

9. The execution of a decree, even if it is well drafted, can be obstructed in ways which vary somewhat in the case of the different classes of decrees. The class that can be subjected to most obstacles and is also the most numerous, is, the simple money decree. It will be convenient, therefore, to examine this class in the first instance. It will be useful to give a brief summary of the chief steps which a money decree-holder has to take and to indicate the stages at which he is likely to meet with objection on the part of the judgment-debtor or others.

10. To begin with, he has to obtain a copy of the decree. Except in the case of an oral application by the decree-holder at the time of the passing of the decree for immediate execution (provided for in Order XXI, rule 11) the court to which an application is made may require the applicant to produce a certified copy of the decree. Moreover, he will have to get a copy in most cases, even if he is not bound to produce a copy with his application, for the purpose of ascertaining the exact amount decreed to him and to enable him to give other particulars in the application in writing which he has to file as required by Order XXI, rule 11, sub-rule (2). Next, the application has to be presented to an officer of the

court or to the court itself according to local rules. Some time is taken by the court to get the application checked as required by Order XXI, rule 17, with a view to see whether it satisfies the requirements of the law. Then if the application has not been filed within a year after the date of the decree or if execution is sought against legal representatives, notice is ordered to the judgment-debtor under section 48, except in very rare cases. Even in cases where the application is filed within the year, though notice is not absolutely necessary under section 48, the court has a discretion, if arrest has been asked for, to order notice under Order XXI, rule 37. The service of this notice takes some time. But, let it be assumed that the notice has been served. The judgment-debtor may choose to appear and contest or not. If there is no contest, execution proceeds to the next stage. If he appears and contests, his objections have to be enquired into. If they attack successfully the plaintiff's right to execute, the petition is dismissed. If not, subject to such restrictions as the court may impose, execution proceeds. There are ordinarily only two methods by which a money decree is enforced, *viz.*, (1) arrest of the person of the judgment-debtor, (2) attachment of his movable or immovable property. Taking the case of an arrest first, the execution of the arrest warrant is entrusted to a process-server (if the amount recoverable does not exceed a given sum) or to an amin or bailiff. These officers are given a certain time within which they should make the arrest. Very often they want extension of time. If the person is arrested and brought before the court, he can be released, if he satisfies any of the conditions referred to in Order XXI, rule 40. If he is not so released, he is committed to a civil prison where he is detained either for six weeks or six months according to the amount of the decree. In most provinces very few persons are in fact imprisoned for debt. The debtor may also express his intention to apply to be declared an insolvent and in that case he may be released subject to his furnishing security to appear whenever the court orders him to appear.

If, on the other hand, the remedy asked for is the attachment of property, a different procedure has to be followed. When the property is movable, attachment may be made at once by seizure; if it is a debt, by notice to the judgment-debtor and to the person owing him the money. If it is immovable property, attachment is made according to the procedure prescribed in Order XXI, rule 54; and this includes a notice to the judgment-debtor not to alienate.

Now, in all these cases of attachment, the decree-holder may be met by an objection that the property is not liable to be attached, as it does not belong to the judgment-debtor. If such an objection be made, an investigation of the claim follows except in the few cases where the court dismisses the claim as filed too late. Ordinarily, pending that investigation, execution is stayed, though that is not absolutely necessary; often, however, the decree-holder himself does not venture, pending the investigation of the claim, to take the risk of incurring the liability for the costs with the pros-

pect of an inadequate price. If the claim is allowed, the decree-holder has generally no knowledge of other assets to attack, and the application is dismissed. But, if the claim is not allowed and when there is no claim, if the property is movable property, it is sold within a short period; and the money subject to the claims of other attaching creditors to rateable distribution under section 73 of the Code is paid over to the decree-holder. If it is a debt, in some provinces, the debt is sold: in others, unless it is very small, a receiver is appointed to realise the money and a regular suit has to be filed by him. In case the property is immovable property, a proclamation of sale has to be settled after notice to the judgment-debtor under Order XXI, rule 66. After settlement of this proclamation, notice of sale has to go, and on the date fixed a sale is held. If the decree-holder wants to bid at the sale, he must get the permission of the court to do so (Order XXI, rule 72) and that can be given only after notice to the judgment-debtor. For thirty days afterwards, the sale cannot be confirmed. Within that time the judgment-debtor or persons interested in the property may apply under Order XXI, rule 89, and get the sale set aside by depositing the amount specified in the sale proclamation minus what had been paid since then, and 5 per cent. more; or the decree-holder may be met by a petition under Order XXI, rule 90, to set aside the sale on the ground of material irregularity in the proclamation or the conduct of the sale. The investigation of petitions of the latter class will ordinarily take some time. If the petition is decided in the decree-holder's favour, the judgment-debtor or the applicant may file an appeal and get the execution stayed. If it is in favour of the petitioner, a fresh sale has to be held and for this a fresh proclamation has to be prepared. If there is no appeal and the petition is not allowed, then the sale is confirmed. After confirmation the decree-holder, if he is not the purchaser, has to file an application for the payment of what is due to him; and it is paid subject to the claims of other attaching decree-holders under section 73, after deducting all expenses.

11. These briefly are the main stages in the life of an application to execute a money decree. At every stage of this journey there is room for delay. As regards the first step of obtaining copies of the decree, the delay is due to the time taken partly in the drafting of decrees and partly in the preparation of the copies. The evidence leads us to infer that there is much delay at this stage and the remedy seems to lie first of all in a closer supervision of this department of work by the judge in charge. In Madras a return has to be sent by the subordinate courts to the district judge showing the number of applications for copies pending beyond fourteen days after they were filed. An acceptance of such a system or one similar to it by all provinces would be of great value.

12. The next stage is one in which there is considerable room for delay and also for corruption on the part of the subordinate officers. It is almost a universal complaint that the petty clerks to whom the task of checking the execution petitions has to be entrusted are not above corruption and that they unnecessarily return the

petitions on all sorts of frivolous grounds, unless, as one witness put it, "their hands are greased." This complaint is not unfounded; and it seems to us that it should be impressed upon heads of offices that they should give very close attention to this matter. A rule should be made that every execution petition presented on a particular day should be brought up for orders the next day unless the judge himself specially extends the time, that all the objections to the petition should be noted thereon once for all. This would be of great help in putting down not only corruption but also delay. A further step to achieve this object is the modification of certain parts of Order XXI, rule 11, sub-rule (2). At present the following particulars have to be given in an execution petition:—

(*a*) the number of the suit;

(*b*) the names of the parties;

(*c*) the date of the decree;

(*d*) whether any appeal has been preferred from the decree;

(*e*) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree;

(*f*) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;

(*g*) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree whether passed before or after the date of the decree sought to be executed;

(*h*) the amount of the costs (if any) awarded;

(*i*) the name of the person against whom execution of the decree is sought; and

(*j*) the mode in which assistance of the court is required, whether—

(*i*) by the delivery of any property specifically decreed;

(*ii*) by the attachment and sale, or by the sale without attachment, of any property;

(*iii*) by the arrest and detention in prison of any person;

(*iv*) by the appointment of a receiver;

(*v*) otherwise, as the nature of the relief granted may require".

It seems to us that some of these are unnecessary and may be dispensed with, *viz.*:—

(*b*) the names of the parties;

(*c*) the date of the decree;

(*f*) whether any, and if any, what, previous applications had been made for the execution of the decree, the dates of such applications and their results;

(*h*) the amount of costs, if any, awarded.

It is because of clerical errors as regards these particulars that most execution applications are returned to the parties for correction. Not seldom one finds returns on the ground that the names of the parties given in the petition do not tally with those given in the decree; or that the dates differ; or that the particulars of the previous applications and the dates of such applications are not correct. It seems to us that when a party gives the court a copy of the decree, there is no necessity to repeat the names of the parties or the date of the decree or the amount of costs, if any, awarded. They are all in the decree itself and the court can easily find them out. As regards the previous applications, in almost all provinces, there is a suits register in which the essential particulars of these previous applications ought to be entered; and the court can very easily find out whether on any previous application satisfaction has been entered or not. These particulars may be sometimes necessary for the purpose of finding out whether a particular application is or is not barred by limitation under article 182. Assuming that this article should be retained, (as to this something will be said later on) this information also can be easily obtained from a reference to the suits register which is in the hands of the court. Insistence on the decree-holder giving these particulars is a main source of delay. Few decree-holders in this country keep a systematic file of previous applications. Most often the applications are not even taken from the vakil's office; and as vakils are often changed, there is difficulty in ascertaining the exact dates of previous applications. Experience proves that often and often the return of execution applications is avoided by paying a few rupees to the execution clerk. He has access to the suits register and can easily give the information to the party, provided it is made worth his while, in spite of rules to the contrary.

As regards the former part of clause (*g*), an application for execution is often returned for the correction of the amount due on the ground that it is inaccurate. The officer returning it does not say why or how it is inaccurate or what the correct amount is, with the result that the petition passes from the vakil to the court and from the court back to the vakil more than once. It seems to us either that it should be made the duty of the court to say in the return what the correct amount is, or that an order should be passed subject to objections by the petitioner that execution do issue for what the court fixes as the correct amount. Modifications of this sort will minimise the delay at the second stage.

13. Let it be assumed that the application has been corrected or was always correct. It has to be presented to the court which has jurisdiction to execute the decree. According to section 38, such a court is either the court which passed the decree or the court to which it is sent for execution. Now, it often happens that there is delay caused by strict adherence to this rule. Taking the case of a petition for the arrest of a defendant, complaints are made that, in many cases, the judgment-debtor having heard that such process is about to issue goes out

of the jurisdiction of the court which passed the decree, and that before the decree can be transferred to the court within whose jurisdiction he has come, he again leaves that jurisdiction, with the result that the decree-holder is unable to get at him anywhere. Three remedies may be suggested.—(1) empowering courts to issue in execution something in the nature of a precept as described in section 136; (2) empowering courts which passed the decree to issue warrants of arrest to its own process-servers who shall be empowered to arrest the judgment-debtor wherever he shall be within or without its jurisdiction; (3) permitting the decree-holder to apply to the court within whose jurisdiction the judgment-debtor is, to order immediate execution on the production of the decree and an affidavit of non-satisfaction by the decree-holder pending the receipt of an order of transfer under section 39. Any one of these courses would be an improvement on the present system. It seems to us, however, that the first suggestion would not be a great improvement, as the delay in issuing such a process will be not much less than the delay in issuing a certificate of non-satisfaction, etc., as required under Order XXI, rule 6. As regards the second remedy, questions of territorial jurisdiction will arise and a possible conflict between the processes of one court and another may occur and retard progress. Apart from that, if such a procedure is to be followed, the number of process servers in each court will have to be indefinitely increased, unless one can adopt a system of what is called " special bailiffs " by appointing a person not in the regular employ of Government, as is sometimes done in Bombay. Such a system is not altogether desirable as the control over such a " special bailiff " cannot always be effective having regard to the temporary nature of his service. Issuing of such warrants outside the ordinary original jurisdiction of the High Court was held to be illegal in Madras and in Bombay we understand that Judges differed as to its legality. The question, however, is not whether it is valid or not in the present state of the law. The law can be changed if necessary. We do not, therefore, pursue the question of the legality further. It seems to us that the third solution is free from the objections which may be raised as regards the others. It may however be said that it would put into the hands of the judgment-creditor a power which he might use, out of malice, in getting arrested an enemy who has satisfied the decree. There is no doubt the possibility of this, but it is negligible, as the risk incurred by the judgment-creditor would be great. There is much less danger involved in its adoption than is involved in allowing arrest before judgment as provided by the existing law. It seems to us that the case where a person has obtained a decree which shows that he has a true claim and puts in a definite statement of non-satisfaction on which he can be easily prosecuted is a very much stronger case. Subject to a discretion to allow or not to allow execution of this sort power should be vested in the court to order execution pending an application for transfer and the receipt of the documents referred to in Order XXI, rule 6. Complaint of delay in the execution of

decrees for want of such a power was loud in Burma where there are a large number of Indians from the Madras Presidency; these often evade the decrees of Burma courts by absconding to India.

14. In this connexion it may also be noted that it is extremely desirable that any doubt that may exist should be removed as to the power of different courts to execute the same decree concurrently. Under the English law, this is allowed. And in India also there have been decisions of the High Courts which sanction the practice. But some doubt has been thrown on this view by the decision of the Privy Council in the Maharajah of Bobbili's case (I. L. R. 39, Mad., 640). This doubt should be removed.

15. Another point should be noted here, *viz.*, the power of the court to which a decree is sent for execution to transfer it to another court. Under the present law, it seems very doubtful whether the court has the power. The result is that if a decree is passed by court A and it had been transferred to court B and the decree-holder wants it to be transferred to court C, court B will have to return it to court A and the court A will then have to send it to court C. This procedure is absolutely unnecessary and the law should be made clear that in this respect the powers of a court to which it is sent for execution are the same as those of the court which passed the decree.

In this connection we may here consider the broad question whether or not the court to which execution is sent should not have all the powers which the court which passed the decree has. Often execution is delayed because, if the judgment-debtor or one of the judgment-debtors dies, the decree-holder has under the present Code to apply to the court which passed the decree to add legal representatives. Till then the execution has to be suspended. See section 50, clause (1). There seems to be no particular reason why this resort to the court which passed the decree is necessary. The questions that have to be determined in such a case are whether the decree can be executed against the legal representative and whether the particular person who is brought before the court by the decree-holder as the legal representative is or is not the legal representative and possesses assets of the deceased judgment-debtor. The court which passed the decree is not in any particularly advantageous position in the matter of deciding these points. On the other hand, investing the court which is to execute the decree with power to add legal representatives will save much time. Again, under Order XXI, rule 16, an assignee of a decree-holder has to apply to the court which passed the decree for the recognition of that assignment. Here again there seems to be no particular necessity for referring the decree-holder to the court which passed it. A similar observation can also be made with reference to Order 21, rule 50, clause (2), where the decree-holder has to apply to the court which passed the decree for leave to execute it against a member of a firm who has not been *eo nomine* a party to the suit. In these and similar cases it seems to us that the court to which the decree is sent for execu-

tion should have the same powers as the court which passed the decree, and we would, therefore, propose that this should be made clear. In section 42 it is stated—"The court executing a decree sent to it shall have the same powers in *executing* such a decree as if it had been passed by itself." This seems wide enough, at first sight, but in the face of the specific language used in sections 39 and 50 (1) and Order XXI, rules 16 and 50, it is doubtful whether the general language can be used to justify the proposition that the executing court has all the powers even for the purposes referred to above. It is, therefore, necessary to make the matter clear.

16. The next stage is the stage of notice and we would here consider the general question of notice in execution cases. In the summary given above, we have indicated the several notices which have to issue in the course of a single execution petition. Every such notice entails delay. We think that in this matter the procedure in respect of an execution petition should as far as possible be brought into line with that employed in the trial of an original suit. In the latter the only notice to the defendant is a notice of the suit. If he does not appear, other steps in the suit are taken in his absence, without further notice. If he appears and contests, he is not given separate notice of the further stages. The suit is adjourned for such further steps in his presence and he has to appear on those days. Even so, in the case of an execution petition, we would suggest that there should be only a preliminary intimation of the petition in some form to the judgment-debtor, and that it should be adjourned to definite dates for further steps such as order of attachment, for settling proclamation, sale, etc. The judgment-debtor must take notice of such adjournments himself by being present in court or otherwise. This will result in an appreciable saving of time. We think that in the case of arrest, and attachment of movables in defendant's residence or building in his possession, no notice is necessary. In fact such a notice will defeat justice. Cases of attachment of movables not in the possession of defendant and of immovables involve notices under Order XXI, rules 46 (*iii*) and 54. So no special notice of the execution petition will ordinarily be necessary. In other cases one notice may be ordered to issue of the execution petition before any further steps are taken.

As regards Order XXI, rule 22, it has been suggested that this rule is unnecessary. We consider however that notice is necessary to legal representatives and we would retain clause (*b*) as it stands. As regards clause (*a*) however we would make it apply only where the application for execution is made more than *three* years from the date of the decree. We would also amend the proviso by substituting "three years" for "one year" wherever the latter phrase occurs. We further think that the second paragraph of the rule should be so redrafted as to ensure that failure to issue notice shall not in any case amount to a defect in jurisdiction but should only amount to an irregularity in those cases in which a proper order dispensing with notice is not recorded.

17. The next stage in the execution proceedings is the hearing of objections if any, taken by the judgment-debtor. The most common objection is a plea of discharge or adjustment partial or whole. As the law of limitation disallows any recognition of payment or adjustment more than ninety days old, the judgment-debtor is careful to plead one made within those ninety days. Then follows the adducing of evidence. It has been stated by more than one witness that a source of great delay at this stage is the amount of oral evidence that is let in and that the mode of proof of such payments and adjustments should be restricted. It is suggested by some that only a payment through a post office or a registered bank or the vakil of the party to whom the payment is made or in the presence of the Sub-Registrar or a village officer should be recognized. Others suggested that it would be enough if there is an unregistered receipt. It has been objected on the other hand that such alterations will work hardship in cases of payment in kind which is ordinarily made by villagers and that it would be enough if some form of a postal money order is prescribed which can be taken advantage of by the payer if he likes, leaving the court to draw an inference against the person alleging the payment from the absence of such a money order receipt. The first thing to be noticed in this connection is that the refusal to take oral evidence in a matter like this will not finally decide the dispute against the judgment-debtor. He will still be entitled to sue the decree-holder for damages for not certifying satisfaction or for return of the money paid and in that suit oral evidence can be let in to the full extent he desires. What is sought to be made a rule now is that in execution proceedings, with a view to avoid delay, only a certain kind of proof should be accepted. The principle that in execution proceedings special restrictions may justifiably be put on the judgment-debtor's right to plead payment and adjustment had the approval of the legislature when it provided that though the right of suit to recover the amount can be exercised in three years the payment, to be recognized in execution, must have been made within ninety days. As regards the suggestion that it would be sufficient to prescribe a form of money order, the difficulty is not in arriving at a conclusion in a matter like this but in the waste of time which the letting in of oral evidence involves. There is no doubt that debts are frequently discharged in India by payments or adjustments made in kind and not in money. It is not practicable to aim at the rule of the English County Court that all payments under a decree should be made into court. Even if the law were to refuse to entertain disputes in execution as to payments unless they were made in one or other of a few recognised modes, the question of adjustments other than by payment would arise. The false allegation of payment might simply be substituted by a false allegation of adjustment otherwise. The question is a difficult one and we are not agreed upon it. While some of us would be prepared to rule out for execution purposes all payments not made in one or other of the ways suggesed: others think that the hardship accruing in some cases would not be sufficiently com-

pensated by the saving of trouble, expense or time. We are agreed, however, in recommending that facilities should be increased for payment of decrees to the court or to the decree-holder by money-order. The Post Office has forms for the payment of rent which work well in Bengal and elsewhere. We think that special forms for payment of decretal amounts, drawn up so as to show the minimum necessary particulars, would be a real assistance to the villager who owes money under a decree. If a reliable method—not too inconvenient—became generally known, it is quite probable that it would be generally used. This would do something to limit disputes as to payment. Beyond this we are not as a Committee prepared to go.

18. The next step is the issue of a process of arrest or attachment. An arrest warrant is entrusted to a peon or a bailiff with a direction that he should arrest the judgment-debtor and bring him to court, unless the money for which it was issued be paid. On such a warrant one of three events may happen:—

(*a*) If the money is paid, the judgment-debtor is not arrested and the court official brings the money into court for payment to the judgment-creditor. When that comes into court the decree-holder has to apply for payment of the money, which means the preparation of an application, the payment of costs to his pleader and in some cases the issue of a notice to the other side or to other judgment-creditors to show cause why the money should not be paid over. It has been suggested to us that all this should be done away with, that in cases where the decree-holder has in his original execution petition or otherwise asked that the money be sent to him or her by money order, there should be a provision for such payment without the necessity of a fresh application. We are of opinion that provision should be made in such cases for the sending of the decretal amount minus all necessary and lawful deductions to the decree-holder by money order and that proper forms of money order should be prescribed for such payments. This is necessary in the case of Indian women decree-holders, especially of widows in whose favour maintenance decrees are passed, and payments are made periodically for a long time. It will save them much trouble if this procedure is followed.

19. Let us now deal with (*b*) the case of a judgment-debtor who is arrested because no payment is made. When he is brought into court, either he is kept in custody for a few days with a view to enable him to pay up the money or he is committed to prison, or he is discharged for one or other of the reasons specified in Order XXI, rule 40, clause (1), *viz.*, poverty or other sufficient cause. We think that in not a few cases much maudlin sympathy is shown to the judgment-debtor, who is supposed to be an innocent victim of the decree-holder. If a man is really poor, the decree-holder is not likely to throw good money after bad to feed him in prison. He will as a rule ask for commitment only in cases where he believes that the judgment-debtor has secreted his

properties—a not unusual proceeding. Experience shows that when once an order for commitment is made money appears in many cases in spite of protestations of poverty. We would, therefore, suggest not that the law should be altered but that it should be administered with less laxity.

20. The third case is (*c*) where the judgment-debtor is not arrested at all. This is sometimes due to the fraud of the process-server and often to the skill with which the judgment-debtor is able to evade arrest. As to the first, the only remedy seems to be a closer supervision of the work of the process-server. It should be impressed upon judges that this branch of the work should be closely scrutinized, and persistent default in arresting judgment-debtors should be a ground for either dispensing with the services of the process-server or his reduction or stopping his promotion, and that good work in this direction should be a ground for special advancement. It has been said that in some places owing to local conditions the process-server is unable to effect arrests even if he wishes to. As a remedy for this it has been suggested that the Police may be used for execution of arrest warrants. There seems to be substance in the opinion expressed by some witnesses that the civil court process-server does not instil the same fear in the mind of the villagers as a policeman does. The difficulty is now got over by some courts by asking the police to help the process-server in arresting the judgment-debtor. We think that the court might be given power to obtain police aid if necessary subject to such rule as the Local Government may make.

21. The first proviso of section 55, rule 1, says "that for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise." In Burma some witnessess before us complained that this proviso practically enables a judgment-debtor in certain places—notably Rangoon city—to live with his family and evade arrest by going a few minutes before sunrise outside the jurisdiction of the court which issued the order of arrest and by returning to his house immediately after sunset. It seems to us that this loophole will be closed if the suggestion made above in paragraph 13 is accepted.

22. Passing on to the case where attachment is the relief asked for, the attached property may be either movable property, including money or a debt due, or immovable property. Taking the case of movable property, it may be either property in the possession of the judgment-debtor or property in the physical possession of other persons but belonging to the judgment-debtor. The rules at present found in the Civil Procedure Code seem to provide reasonably well for the speedy realization of a decree by such attachment and sale, but the time at present given for the sale of attached movable property seems to be unnecessarily long. Under Order XXI, rule 68, at least fifteen days must be given in the case of movable property calculated from the date on which the copy of the proclamation has been affixed on the court-house. It seems to us that in several

cases this is unnecessarily long and that the minimum may well be reduced to a week after the date on which the copy of the proclamation has been affixed on the court-house.

In cases in which the property attached is a debt, the present practice generally drives the judgment-creditor to a suit to realise the amount; for, in such cases either the debt is sold and he or somebody on his behalf has to purchase the debt, or a receiver is appointed. Often the judgment-creditor has himself to be the receiver to save the commission which a receiver would claim. It seems to us that the necessity for these proceedings delays matters unduly. The speedier and better course seems to be a wider and more constant employment of what is called "garnishee procedure" now much used in Presidency Towns, and in England. Subject to a reasonable provision for appeal, any controversy about the attached debt should in many cases if not in most be settled in the execution proceeding itself, *e.g.*, whether the garnishee owes any money and if so how much and whether he should or should not be made to pay the money into court. There is a tendency on the part of persons who owe money to judgment-debtors to put forward frivolous defences in the execution proceedings hoping by this means to drive the judgment-creditor to another suit and thus to gain time for payment. We would, therefore, recommend that rules should be added in Order XXI providing for such investigation and that those rules should be acted upon in as many cases as possible.

23. Under section 60 several kinds of properties belonging to the judgment-debtor are free from attachment. We think that some of them should be removed from the category of non-attachable properties and that with respect to others the law should be made clear. For, *e.g.*, under clause (*h*) "allowances (being less than salary) of any public officer or of any servant of a railway company or local authority while absent from duty." Now, this is an absolute rule and, however, large the allowance may be, it cannot be attached, if it is only a pie less than the salary. If a person gets an allowance of Rs. 1,000, it seems to be unfair that the whole of this allowance should be free from liability to attachment. We think that it should be so modified as to limit the exemption to such portion of the allowance as in the opinion of the court is necessary for the officer to live in ordinary comfort, or to such portion of it as would be exempt from attachment if it fell under clause (*i*). Taking clause (*i*) as it stands suppose the judgment-debtor's allowance while absent from duty is Rs. 40 or less, it would be wholly exempt. If his allowance is between Rs. 60 and Rs. 80 whatever is over Rs. 40 would not be exempt. In any other case the difference between the allowance and one moiety of his salary should not be exempt. Otherwise an officer gains by taking leave.

24. We come next to the class of cases where immovable property is attached. That is the class in which there is considerable delay. The first thing which the decree-holder finds in many cases as soon as an attachment warrant is taken is that the judgment-

debtor having had previous knowledge of the order for attachment had transferred the property sought to be attached to some other person. Even though that person may have had knowledge of the order for attachment, it has been said that the atttachment takes effect only after the order has been proclaimed according to Order 21, rule 54, clause (2) which runs thus:—"The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court-house and also, where the property is land-paying revenue to Government, in the office of the collector of the district in which the land is situate." It seems to us that this gives us an opportunity to the judgment-debtor to defeat the attachment by an alienation after the order is made but before the attachment is actually proclaimed. We think the interests of justice require that that order should take effect from the date of the order for attachment as against those claiming as volunteers under the judgment-debtor, and as against others from the time they had knowledge of the passing of the order of attachment. Cases are not infrequent where the defendant in the *interim* executes a gift of the property making it necessary for the decree-holder to file a suit under section 53, Transfer of Property Act, to set it aside as one made in fraud of creditors. Or he alienates the property for value to some person who knows the order of attachment but who says he is not bound by the order because it was not proclaimed. The amendment proposed will not affect any alienee for consideration who has no knowledge of the order of attachment and we do not see why any others should be protected.

25. Even if such an objection is not taken, the decree-holder is often met by a claim petition under Order XXI, rule 58. Many of the witnesses before us have stated, and we think their view is substantially correct, that very many of these petitions are frivolous ones put in at the instance of the judgment-debtor himself to defeat or delay his creditor. One object with which such petitions are filed is the gaining of the time taken by the investigation of the claim. In several cases when a claim is preferred the judgment-debtor or the applicant applies under Order XXI, rule 58, clause (2) to postpone the sale pending the investigation of the claim or objection. The court is given a discretion to postpone the sale on that ground. As in most cases the court is unable to state at the beginning, unless the claim has been unnecessarily delayed, whether the claim is true or not, it is inclined to postpone the sale. It seems to us that there is no reason why such an application should be allowed at all as regards immovable properties or movable properties which have no special sentimental value. What is sold in execution is the right, title and interest of the judgment-debtor and even if the sale is held, the claimant's interests, if they exist, will not be affected by the sale. The purchaser will get nothing more than such right, title and interest of the judgment-debtor and the claimant will not be any the worse for the sale. It may be that when it comes to a question of delivery of the

property, there may be injury to the claimant, if he is really in possession. Therefore, if a provision is made that the court may, pending the investigation of the claim or objection, postpone delivery, there will be sufficient safeguard. We would, therefore, omit Order XXI, rule 58, clause (2) and add a clause providing for the court postponing delivery of the property to the purchaser pending the investigation of the claim. If, however, rule 58, clause (2) is to stand as at present, an order postponing a sale should be made only on a deposit by the person who wants the sale to be postponed of the sale warrant amount or a reasonable estimate of the value of the property sold. Mere taking of security, and giving discretion to the court to insist or not on such security or deposit lead to laxity. It should be made an inflexible rule that if the delay is to occur at the instance of a third party, it should not prejudice the decree-holder. Insistence on the deposit of the decree amount will secure this object. It will also save much unnecessary investigation if the order under Order XXI, rules 60 and 61, is expressly made conclusive not only as regards the particular attachment in respect of which the claim was made but as regards the execution of the decree in future, unless either party can set up a title subsequent to the date of the order.

26. Further, the judgment-creditor can be harassed by a person whose claim has been dismissed, filing a suit under Order XXI, rule 63, and as this suit may lead to an appeal and a second appeal execution can practically be stayed for a long time. This seems to us a very unsatisfactory state of affairs. Several witnesses have told us and we believe their evidence has a substantial foundation, that frivolous suits of this sort are encouraged by the fact that only Rs. 10 are required as the court-fee for such a suit, however valuable the property may be. It seems to us that, if the court-fee for such suits is raised to half the value of a suit for possession of that property, some check would be found against such frivolous suits.

There is another point which may be noticed in this connection, *viz.*, the frequency with which pending such a suit, injunctions are granted in stay of execution or delivery. The essential question under Rule 58 is as to who was in possession. An order against the claimant involves a finding that he was not in possession on the date of the suit in his own right. Such an order is at least *primâ facie* evidence in the trial of any petition for injunction restraining delivery or sale, and it seems to us to be generally indefensible to make an interlocutory order for stay in favour of a person whose possession is not clear. The Punjab rules as to this seem to work injustice. No injunction should issue save in very exceptional circumstances where the court is satisfied that the order on the claim petition is *primâ facie* wrong or indefensible.

27. Assuming that the claim petition has been disposed of in favour of the judgment-creditor and that no order for injunction has been made stopping execution proceedings, the judgment-creditor has other obstacles to overcome. He has first of all to get

an order under Order XXI, rule 64, for the sale of the property. When such an order is obtained, the court shall cause a proclamation of the intended sale to be made. An application for an order of sale shall, under Rule 66, clause (3), be accompanied by a statement signed and verified containing the matters specified in clause (2) which are " (*a*) the property to be sold; (*b*) the revenue assessed upon the estate or part of the estate, where the property to be sold is interest in an estate or part of an estate paying revenue to the Government; (*c*) any incumbrance to which the property is liable; (*d*) the amount for the recovery of which the sale is ordered; and (*e*) every other thing which the court considers material for a purchaser to know in order to judge of the nature and value of the property." Under clause (*e*) of this sub-rule (2) courts have been settling what the price of the property to be sold is, and this leads to an investigation, delaying execution. It has been held that, if the price has not been properly stated there is a material irregularity within Order XXI, rule 90. It has been suggested to us that all this investigation leads to needless waste of time and that it should be enough if the prices fixed by the judgment-debtor and the judgment-creditor are both mentioned in the proclamation. The real object of attempting to fix the price at this stage seems to be to find out whether the quantum of property sought to be sold is sufficient to pay off the decree or whether it is more than sufficient. Though that may be a very desirable object, we do not think its attainment justifies a prolonged investigation. We would, therefore, suggest either that there need be no investigation at all on a matter like this, and the estimates given by both the judgment-creditor and the judgment-debtor may be mentioned in the sale proclamation with a note that neither is accepted by the court or that a rough and ready figure may be fixed by the court having regard to the circumstances of the case. Any error in it should not be deemed to be a material irregularity within Order XXI, rule 90. The suggestion that no price need in any case be mentioned in the sale proclamation would, perhaps, be a drastic change.

We may here refer to another source of delay, *viz.*, an appeal by the judgment-debtor against orders made in settling this proclamation. The preponderance of opinion at present is that these orders are administrative orders which are not liable to appeal. But, this view is not universally accepted, and it would be well to establish by express provision, that neither appeal nor revision should be allowed.

28. After the sale proclamation, the actual sale has to be held. According to Order XXI, rule 68, a period of at least 30 days must be allowed calculated from the date on which the copy of the proclamation has been affixed on the court-house of the Judge ordering the sale. Now, according to rule 54, sub-rule (2), read with rule 67, sub-rule (1), this proclamation has to be proclaimed at some place on or adjacent to the property to be sold and a copy of the order has to be affixed on a conspicuous part of the property and *then* upon a conspicuous part of the court-house. Therefore, these thirty days really have to be counted, not from the

date of proclamation in the village where the property is situated but usually after about a week or 10 days which is the time taken by the process-server to return back to the court to affix the copy of the proclamation in the court-house. This, we think, is unnecessarily long and the period may be reduced to fifteen days in most cases. This does not necessarily mean that in all cases only fifteen days will be allowed; for what Order XXI, rule 68, fixes is the minimum. So, in special cases the court can fix a longer time if necessary.

29. A suggestion has been made that the writ of attachment and sale proclamation may be issued and served simultaneously with a view to save time. It seems to us that this, while reasonable in the case of the execution of pure rent decrees by the sale of the tenure (under the Bengal Tenancy Act), would lead to inconvenience if applied to execution generally. First of all there are many cases in which the attachment warrant is returned unexecuted on the ground that the description given in the attachment application is not correct, that there are no properties corresponding to those described in the application and that other people claim some of the properties attached. In every one of those cases the proclamation will have to be modified with reference to the return; for it may be that the decree-holder on hearing such claims may not choose to bring some of the properties to sale. Therefore, in several cases, extra time will be taken for the purpose of amending the sale proclamation and fixing another date. On the other hand little time will be gained by issuing the processes together. At present subject to the lessening of the period suggested above, the whole period need not take more than a month and a half. That seems to us to be a reasonable time which should not in any way be curtailed. The question of service of notices on the judgment-debtor himself, is covered by the suggestion that we have made, *viz.*, that the hearing of an execution petition shall be, like the hearing of a suit, postponed to definite dates.

30. After the sale is begun the court has a discretion under Order XXI, rule 69, to adjourn a sale to a specified day and hour. But under sub-rule 2 of the same rule the longest period to which a sale can be so adjourned is seven days. Paradoxical though it may seem, this restriction on the power has a tendency to prolong not only the sale but the period of execution; for, if the court would, without a fresh proclamation, adjourn it for a reasonably long period the judgment-debtor would often be able to produce proper bidders to bid at the sale or otherwise to adjust the decree. But, if the court is not able to do so, either that sale has to be abandoned and a fresh proclamation has to be issued which means another thirty days and more, or the judgment-debtor contrives to raise some sort of objection to the sale by a petition under Order XXI, rule 90, or section 47, and prolongs the period of execution. It seems to us, therefore, that this restriction of seven days should be removed and the court should be given power in proper cases to adjourn without fresh

proclamation for such period as it thinks necessary. To avoid injury to the decree-holder, the maximum may, if necessary, be fixed as thirty days. It also often happens in cases of this sort where there is more than one judgment-debtor that the principal judgment-debtor consents but other persons are absent and do not appear and consent to waive fresh proclamation, or otherwise indicate their consent to the postponement for more than the fixed number of days, with the result that a fresh proclamation often becomes necessary. We think it would assist speedy execution if it is also provided that it is enough if those who have appeared in the execution proceedings consent, and that the consent of persons who have not appeared in the execution proceedings is unnecessary.

31. After the sale has been held, there is often further trouble. The ordinary judgment-debtor in this country clings tenaciously to his property and will exhaust all endeavours to get the sale set aside. He can under the law apply under rule 89 to pay up the sale warrant amount *plus* 5 per cent. solatium or under Order XXI, rule 90, to apply to have it set aside for irregularities. Order XXI, rule 89, has been so construed that in some cases a person who has an interest in the property cannot put in the money and save the property, because his interest did not exist at the time of the sale. Now, it seems to us that such a restriction leads often to frivolous applications under Order XXI, rule 90. Take the case of a person who, after the date of the execution sale, purchases the property at a private sale. Having regard to the notorious fact that court-sales do not produce the full value of the property, he is generally one who has paid very much more than was realised at the sale. Now, if such a person is not allowed to put in the money and set aside the sale, what happens is that he gets the judgment-debtor to put in a petition under rule 90 and prolong the execution proceedings. Again, there is conflict of views as to whether the judgment-debtor can apply after he has sold the property. This question as to who is entitled to apply has been the subject of much subtle argument. It does not matter to the judgment-creditor who pays the money so long as he gets his money. Often the judgment-debtor is unable to find the money in time to save the property, but some of his relatives are willing to pay it, *e.g.*, during his absence. In fact in Madras there was a case where the judgment-debtor had been long absent and his daughters were willing to pay the money under Order XX, rule 89, and the question arose whether they were entitled to pay and save the property. No uninterested person will deposit the money for he does not get the property by doing so. We would, therefore, suggest in the interests of the decree-holders themselves that Order XXI, rule 89, should be so modified as to allow any person claiming any interest in the property sold at the time of the sale or at the time of the petition or acting for or in the interest of such a person to apply and get the sale set aside. One result of the present state of affairs is that such persons encourage the judgment-debtor to file petitions under Order XXI, rule 90, and prolong the enquiry to compel the

decree-holder to accept the decretal amount and compromise. This they can effectively do under certain decisions.

32. The next stage at which delay usually occurs is where a petition under Order XXI, rule 90, is filed to set aside a sale. Under that rule the decree-holder or any person entitled to share in rateable distribution of assets or whose interests are affected by the sale may apply to the court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the court is satisfied that the applicant has sustained substantial injury by reason of such an irregularity or fraud. Several witnesses examined before us have given it as their opinion that most of the petitions filed under this rule are frivolous. As a remedy, some went so far as to suggest that such objections should not be allowed but they did not suggest any other way by which the person affected could get his injury remedied. Other suggested that the court should have power to dismiss the petition summarily—a power similar to the power given under Order XXI, rule 58, clause (1). A third suggestion has been made that such a petition should not be entertained unless the sale warrant amount is deposited in court or sufficient security is given therefor. A modified form of this suggestion is that the amount to be deposited need only be what was realized by the sale of the property if it is less than the sale warrant amount. Under Order XXI, rule 78, no irregularity in publishing or conducting the sale of *movable* property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or if such other person is the purchaser, for the recovery of the specific property and for compensation in default of such recovery. It is possible to suggest that the same course should be applied to immovable property also, with an added proviso that such a suit for the recovery of the property may be allowed even against the purchaser and that in such a suit proper court fees shall be paid as in a suit for possession and that the sale warrant amount and the interest thereon at the decree rate up to the date of the plaint shall be deposited with the plaint. On the whole the best remedy seems to be to adopt the third method suggested. The second seems unacceptable, for if an enquiry is to be allowed at all it is desirable that it should be a thorough one and as a period of thirty days is fixed for filing such petitions no question of unnecessary or undue delay would emerge. It will be difficult for a court to say at the very beginning that a petition is a frivolous one or is designed only to delay. Moreover, if such a power is given to the court the corresponding right of suit under Order XXI, rule 63, could hardly be withheld. This would not result in speed. A rule requiring a petitioner to deposit the sale warrant amount or the amount realised by the sale (whichever be the less) will act as a deterrent against frivolous applications and will also not seriously injure the decree-holder, because he can if necessary be allowed

to take the money out of court on furnishing security. A mere order to give security would not, in our opinion, be sufficient unless section 145 be amended: if, however, it be amended as we propose, security might be permitted.

There is, however, one further suggestion which we like to add, *viz.*, that no sale should be set aside on any ground which the applicant could have put forward before the sale was concluded. At present he can wait till the sale is over and then start proceedings to set it aside and delay execution and delivery. It was his clear duty to have come at the proper time and objected to any defects if he could have done so before the sale was concluded. Having failed to do so, he should not be permitted to reopen the matter.

As regards this Rule (90), it has been suggested that the evil of frivolous applications will practically cease if a receiver is appointed in respect of the property sold in default of the applicant depositing the money or furnishing security for the satisfaction of the decree. This may be done in suitable cases. But, it cannot be a proper remedy in cases where the property sold is of small value; for the cost of the appointment will often swallow up the whole of the profits; and if his petition succeeds, the poor judgment-debtor will be hard hit; the decree-holder also will get very little by the appointment of a receiver. Moreover, the appointment of a receiver will tend to the prolongation of the enquiry; for, the decree-holder will not then be in a hurry to get to the end of the matter. Even at present, a receiver can be appointed in such circumstances, on a proper case being shown. The question is not one of want of jurisdiction. We commend the suggestion for adoption in suitable cases only.

33. Even after the sale there are further difficulties in the way of the realisation of the fruits of the decree; for when the purchaser, be he the decree-holder or a stranger, goes to take possession of the property purchased, he can be obstructed in taking possession and then an enquiry has to be held under Order XXI, rule 97, *et seq.* The present rules as to the investigation of such a matter are fairly elaborate and require only slight modifications. The question, however, is whether there is sufficient protection against frivolous obstruction; and it has been suggested that the law should be made stiffer against the obstructor. At present there is no provision for ordering compensation against him. The worst that will happen to him is that he will have to pay costs. We think that power should be given to courts, subject to certain limits which may be fixed by the respective High Courts, for the awarding of compensation in such cases. Under Order XXI, rule 98, a man who obstructs can be sent to the civil prison. It seems to us that it will be poor consolation to the person obstructed if not only he has to spend money to fight the frivolous objector but has also to pay for feeding him in the civil prison. The language of the rule should be made clear that the detention in civil prison shall be at the expense of the Government and that the person at whose instance he is so detained need not pay any subsistence

allowance in view of the fact that the obstruction is also really an affront to the Court.

By rule 98 when a court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation it shall direct that the applicant be put in possession of the property. But it does not provide for a case where the obstruction is not at the *instigation* of the judgment-debtor—the judgment-debtor may not be present at all to instigate—but is made on his behalf. Where the judgment-debtor is absent his relatives in his village obstruct professedly or truly on his behalf. At present according to the language used in this rule, there is no provision to remove such obstruction. We think that after the words " at his instigation " the words " or on his behalf " should be added, to facilitate the purchase of properties in court sale. It may be observed that in section 74 which has to be read with this rule the words used are " on his behalf " and the phrase " at his instigation " is not there. We think it is desirable to retain both the phrases. We would recommend the amendment of section 74 accordingly. We would also recommend Order 21, rule 99, be also amended so as to apply to all cases except those provided in rule 98 and rule 95 which has to be read with it. As they stand at present these rules 98 and 99 do not exhaust all cases of obstruction. It may also be pointed out that the phrase " on his own account " has given some difficulty in the case of sub-tenants where their lessor's right has determined.

CHAPTER 30.

Execution. Other proposed amendments in the Law relating to execution. Appeals against orders in execution. Execution sales.

So far we have traced the ordinary course of an application to execute a money decree, the various ways in which it can be obstructed and the remedies that are to be applied. There are other defects in the law of execution, as it stands at present, which lead to delay and injustice. They will, we think, be made clearer by separate treatment. It will be convenient to adopt the order of the Civil Procedure Code itself and to take certain sections and rules separately.

2. *Section 47.*—Section 47 of the Code is the principal section dealing with the question of execution. It is doubtful whether a stranger-purchaser in execution is a party within the meaning of this section. Therefore, when a stranger purchases the property in an execution sale, and an order is made against him in the course of subsequent proceedings to obtain possession, a question often arises whether he should have recourse to a further suit to recover the property or should be treated as a party under section 47 with a consequent right of appeal. If he has to file a suit for the possession of the property he is more chary of bidding the full price with the result that the property for sale is likely either not to be sold or to fail to realize the proper price. This leads to petitions under Order XXI, rule 90, and to failure to realize the entire amount of decrees. If, however, a stranger-purchaser is allowed to work out his right in execution, more persons will be willing to offer proper prices at court sales. It is, therefore, desirable (the evidence before us is unanimous on the point) that he should be deemed to be a representative of the parties within the meaning of section 47.

Another matter as regards section 47 is whether or not a party dismissed from a suit or one who is exonerated from it by the plaintiff is a party within the meaning of section 47. The Madras High Court has held that he is a party (*vide Sannamma* v. *Radhabai* I. L. R. 41, Madras, 418) and the result is that in the case of any claim by him the matter has to be dealt with under section 47 subject to a right of appeal. This often delays execution, for an investigation under section 47 has to be more elaborate than an investigation under Order 21, rule 58. Why a person who has been exonerated from a suit by the plaintiff himself should be deemed to be party for this purpose is not clear. We think that such a person should not be deemed to be a party within the meaning of section 47 so as to ask for an elaborate trial in execution proceedings, and that the explanation should be so modified as to cover

only cases where the plaintiff has asked for a decree against the particular defendant and his claim is dismissed. It should be also made clear that a person dismissed from the suit as an unnecessary party by the court should not be treated as a party within section 47 if that order has become final.

A more important question with regard to section 47 is whether an appeal and a second appeal should be allowed against all orders under that section. No doubt important questions of law occasionally arise in the course of execution of decrees but it seems to us that there are some questions with regard to which there ought to be a restriction on the right of appeal and that in other cases safeguards should be inserted to prevent abuse of the right of appeal. Take for instance the question as to the discharge or adjustment of a money decree—if a person says that he has paid any money towards a decree which is not one made in a suit of a small cause nature under Rs. 500, even if it be that the payment was only of a couple of rupees, he has a right of appeal and a right of second appeal under the present Code. If he had, however, to sue for the same money he could only bring a suit in a small cause court, and the decree in such a suit would not be subject to appeal. It has been suggested to us, that even in a case where the decree was not passed by a small cause court, orders in execution should be non-appealable if they deal only with pleas of payment up to the extent of the small cause jurisdiction of the court dealing with the plea of payment or adjustment. Thus in a subordinate judge's court up to Rs. 1,000 or 500 according to the extent of its small cause jurisdiction, orders as to payments towards and adjustments of a money decree should not be appealable. We think that a modified form of this suggestion would be more satisfactory, *viz.*, that munsifs and corresponding officers should have the power of deciding finally up to Rs. 200 but that such powers should be conferred in the case of each individual officer by order of the Local Government or High Court (*cf.* section 153 of Bengal Tenancy Act). In the case of higher officers they should have power up to Rs. 500 *ex-officio* whether at first instance or on appeal. Again it seems to us, that in the case of money decrees restriction should be placed on the right of appeal by making the appellant deposit or at least give security for the decretal amount if he is the judgment-debtor. It seems only just that after trial this protection should be given to the successful decree-holder. As regards the right of second appeal, whatever may be said as regards such a right in the case of original suits, there seems to be very little justification for allowing parties to the suit or their representatives to file second appeals against orders in execution as a matter of right. We, therefore, suggest here specially and independently of any general recommendation as regards second appeals that no party should be entitled to file a second appeal in such cases except by special leave. The special objection to allowing a second appeal in execution cases as of right is in the fact that even if there is no formal stay of execution, the decree-holder does not ordinarily wish to risk the expenses of execu-

tion pending the decision of the appeal. It would be possible to make orders as to security at the time of granting leave.

3. *Section 48.*—Section 48 is to be read with article 182 of the Limitation Act. It is provided in this section that the execution of a decree—a money decree or other decree—should not be allowed after twelve years from the date of the decree sought to be executed or in cases where a period is fixed for the payment of the money or the delivery of any property from the date of the default in making the payment, etc. This would ordinarily mean that a decree-holder can execute his decree at any time within those twelve years, but under Article 182 he has to apply every three years to keep the decree " alive ". Otherwise though section 48 allows twelve years his decree will become barred by limitation. This provision has led to an enormous number of frivolous applications, and the statistics to which we referred in the beginning of Chapter 29 are swollen by reason of this requirement. Opinion is almost unanimous that the rule requiring applications to fall inside the three years limit should be deleted and we recommend this with a view to save the time of the court and of the parties. It has, however, been suggested that if this is done there will be some room for fraud as regards *ex parte* decrees, since a dishonest decree-holder might obtain a decree and wait for some eleven years before executing it by which time the evidence as to the service of summons on the defendant would be lost. We think that though this a possible danger it is not for that purpose necessary to retain the provision now in question. Other remedies can be provided. Firstly, it has been suggested that in the case of money decrees the period of twelve years may be reduced to six years and thus the danger be lessened; secondly, that in the case of *ex parte* decrees one execution application should be made—say within one year after the decree—and that then the decree-holder may apply at any time within the twelve years allowed.

4. We have found opinion to be divided as to both these remedies. It has been said that no decree-holder willingly delays execution and that if he does so it is only because there is no property for him to reach; that he should be allowed to wait for some property to come into the hands of the judgment-debtor; and that there is no reason to cut down the period to six years or to anything less than twelve. On the other hand it has been said that Indian creditors are notoriously lazy; and that if the period is reduced to six years they will receive a needed stimulus. It seems to us that a provision for the grant of leave to execute a decree after six years would reconcile both points of view. We often find that decrees are sought to be executed more than six years after the decree was passed and that such execution petitions merely add to the number of infructuous executions. Our recommendation is that ordinarily the execution of a simple money decree shall be barred after six years, but that the decree-holder shall be entitled to apply to the court which passed the decree or which can execute the decree for leave to issue execution where he can make a special case on the

ground that he has discovered specific property belonging to the judgment-debtor or that the judgment-debtor has recently become owner of such property. In such an application he should be bound to specify the property against which he wants leave to proceed. This course while limiting the period of arrest to six years from the decree, will give the necessary protection to the decree-holder in case the judgment-debtor comes into some property. This will also bring the parties before the court within a reasonable time after the decree and will in a large measure minimise the danger apprehended in the case of *ex parte* decrees. It should then be open to the court to reduce the rate of interest accruing after the lapse of six years under the decree as a condition of granting leave. An objection to the total repeal of the provision for an application every three years has been based on the ground that representatives of a decree-holder who has received money may deny the payments, knowing nothing of them, whereas if a decree-holder is made to come into court every three years there is less room for such fraud. This, however, does not seem to us to be a sufficient reason for maintaining the very cumbrous procedure of article 182. If, however, the article is to continue as it is and intermediate petitions are still to be required, we think that the period of three years should begin not from the date of the last application but from the date of the last order on such a previous application. Opinion is practically unanimous on the latter point.

5. *Section 66.*—Section 66 deals with the question of *benami* purchases at court sales. We do not see why so complete a distinction should be made between a defendant and a plaintiff in the matter. It has, however, been contended that, where a person has been in possession under a *benami* purchase, his rights should not be disturbed, because, otherwise there will be great room for fraud. This is only a part of the general problem of *benami* in this country, about which much can be said on both sides and which is considered elsewhere. We think, however, that in any case this section might be extended so as to apply not only to plaintiffs but also to defendants who at the time of the suit are not in possession of the properties sold in auction.

6. *Sections 68 to 70.*—Sections 68 to 70 deal with the delegation to the Collector of the power to execute decrees against immovable property. Both in the Punjab and United Provinces loud complaints have been made that when once the sale of the attached property is put into the hands of revenue subordinates, there is enormous delay, and that the courts are unable to control the proceedings therein. These proceedings are often left to be attended to by very low-paid underlings in the revenue department and decree-holders find it very hard to realise the best prices for the property to be sold. It has, therefore, been suggested that the transfer of sales of attached property to Collectors should be abolished and that the civil court should retain the same authority as in the case of non-ancestral property in the United Provinces and non-agricultural land in the case of Punjab. It seems, however, to us that there

is much to be said in favour of entrusting the revenue department with the sale of certain classes of properties, as it is notorious that in civil court auction sales the proper price is not got and as the revenue department is more likely to know the best means of realising the utmost out of the sale of the property. Moreover, questions of public policy are involved in this system which we think we should not discuss. But there is no doubt that there is much justification for the complaint of excessive delay. Time is sometimes given much too readily. We think that Local Governments ought to pay great attention to this matter and that they should require returns to be sent periodically by Collectors showing what they have done in connection with the proceedings sent to them. Such returns should be submitted through the district judge to the High Court. In some parts of the country it appears to us that the question of policy involved in the requirement that such matters should be dealt with by the Collector deserves to be reconsidered.

7. *Section 72.*—Section 72 of the Civil Procedure Code enables a Collector to arrange for the payment of decretal amounts otherwise than by the sale of the land. This is a principle which, we think, can very well be extended to executions by civil courts themselves. At present, a civil court, if it wants to realise the decree amount out of attached property, can only sell the property outright or appoint a receiver to realise the profits. There is no provision authorising it to mortgage or lease out the property. Appointment of a receiver is rarely resorted to for reasons which will be stated later. There are places where it will be easy for the court to lease for a premium or mortgage the property at a fair rate of interest, and pay the amount due to the decree-holder. A power to do either can well be used especially in cases where the defendants are minors and are represented only by a guardian *ad litem*, where a sale would altogether take away from the judgment-debtor property perhaps held in the family for generations and where for others also it would be desirable in the interests of justice that the sale should not be held. This would prevent stale actions by minor parties to set aside execution sales. We would, therefore, suggest that a provision may be made enabling the court not only to sell the attached property but also to alienate it otherwise temporarily with a view to realise the decretal amount. In this connection we may consider the suggestion that the power to appoint receivers should be more constantly used for the purpose of realising the money decreed. At present, a receiver is rarely appointed in execution except to dispose of crops which have been attached or to manage an industrial concern. The usual method is, as we said, to sell the property attached. It will no doubt lead to fewer petitions to set aside sales and to more harmonious relations between the parties if the appointment of receivers is made use of more often with a view to collecting the profits and paying off the decree. But this can be done only in cases where the property is sufficiently large to bear the extra cost of appointment of a receiver.

8. *Section 73.*—Section 73 deals with the distribution of assets or what is technically called "rateable distribution." It places the man who has taken the trouble to bring the property to sale and the person who applied for execution just before the date of the sale practically in the same position. For, after deducting certain expenses of the sale, it allows rateable distribution among all of them. It seems to us that in this matter the person who takes the trouble of bringing the property to sale is injured. For, it is notorious that besides what will be technically the expenses of the sale the person who has to execute a decree spends very much more outside the court. He has to instruct his vakil in getting the execution petition prepared and in doing several other things which are necessary for a successful termination of the execution, and incur a considerable expenditure which is not included in the costs allowed by the court. To that extent the man who pursues execution is at a disadvantage, and it seems to us reasonable that he should not be the loser. We would, therefore, suggest that he should receive towards satisfaction of his decree a preference to the extent of (say) $2\frac{1}{2}$ per cent. of the distributable fund in addition to his share therein.

9. *Section 145.*—Section 145 requires alteration. As it stands, only in cases where a person has rendered himself personally liable can the person entitled to the security proceed to realise it by way of execution and without a fresh suit. If the security is immovable property, a further suit is necessary. That means delay. In execution proceedings orders are passed on the basis of such security. Such orders are orders staying execution generally or staying sale pending investigation into claims. If in such cases a decree-holder is asked to file a fresh suit to realise the security he is exposed to an unjustifiable penalty. We would recommend that in all cases of security of whatever description, the Court should have power to realise the property or interest comprised in the security and should ordinarily realise the security by execution in the suit or proceeding itself without a fresh suit. Power to relegate the creditor to a fresh suit might be reserved as a precaution against cases of special complication.

10. *Section 152.*—According to section 152, clerical or arithmetical mistakes in decrees or orders can be corrected by a court. It is sometimes held that the "court" therein means only the court which passed the decree or order. This often leads to delay when the error is discovered by the court to which the decree is sent for execution. It seems to us that where the errors of the character referred to in the section are apparent on the face of the decree or order sought to be executed and in the judgment on which it is based, such an executing court should also have the power to correct such errors. Any such correction should be communicated to the court which passed the decree.

11. *Order XXI, rule 16.*—Rule 16 deals with applications for execution by transferees of decrees. We have already said that such an application may be allowed to be made to a court which is

not the court which passed the decree, but which has obtained jurisdiction to execute it. We would further recommend that the portion of proviso 1 which requires notice of such application to be given to the judgment-debtor should be deleted. We think it would be enough if it is made part of the general notice in execution in cases where such a notice is necessary. The danger that an unauthorised person would be able in absence of notice to execute a decree is not a real danger. The court has in any case to send a notice to the original decree-holder and see whether he agrees to the transfer or not. If he agrees we do not see what it matters to the judgment-debtor as to who executes the decree against him so long as the decree is not satisfied.

In this connection we would recommend that execution may issue, if with the application for execution an affidavit by the decree-holder admitting transfer it filed, subject to issue of notice to such decree-holder. The result of insisting on such a notice to the decree-holder and to the jugment-debtor is to give the judgment-debtor ample time to secrete his property. The relief is greatly required in the case of women who have to transfer decrees for execution to avoid going to court in connection with execution proceedings.

12. *Order XXI, rule 17.*—By rule 17 power is given to the court to reject the application in case the requirements of rules 11 to 14 are not complied with. This allows rejection by courts without giving the decree-holder an opportunity to amend his petition. This power is sometimes used improperly in order to swell the number of disposals. We think such a power to reject should be given only in case the defects pointed out are not remedied within the time fixed by it, and that the rule should be amended accordingly.

13. *Order XXI, rule 24.*—In rule 24 there is no provision for fixing a date on which the process should be returned to the court. It only provides for a day being specified on or before which it may be executed. It is left to the nazir or deputy nazir to fix the date of return. We would add to rule 24 (3) the words "and a day shall be specified on or before which it shall be returned to the court."

14. *Order XXI, rule 26.*—Rule 26 deals with stay of execution by a court to which a decree has been sent, for a reasonable time, to enable the judgment-debtor to apply to the court by which the decree was passed or to any court having appellate jurisdiction for an order to stay execution, or for any other order. It also allows such a court to order restitution of such property or even to discharge an arrested judgment-debtor pending the result of such application. Now, according to clause 3 of that rule before making such an order for execution or restitution or discharge the court may require such security from or impose such conditions upon the judgment-debtor as it thinks fit. It seems to us that clause (3) should make it obligatory on the court to take security unless sufficient cause is shown to the contrary.

15. *Order XXI, rule 31.*—Under rule 31, where a decree is for any specific movable property, the attachment made under sub-rule 1 has to remain in force for six months before the attached property can be sold. It seems to us that the period of six months is too long, and that it may well be reduced to three months giving the court a discretion to fix a period beyond three months in any special case according to special circumstances.

16. *Order XXI, rule 32.*—Under Order XXI, rule 32, clause (3), property attached to enforce a decree for specific performance or restitution of conjugal rights or for an injunction cannot be sold, unless the attachment has been in force for one year. It seems to us that this is an unnecessarily long period. The object of giving any time in such a matter is to give an opportunity to the judgment-debtor to obey the decree; and we thing a period of three months will ordinarily be enough for him to do so. There may be cases when perhaps he might ask for more time and in such cases the court may be given power to give time up to a year. But it seems unnecessary to compel a decree-holder to wait for a whole year in all cases if he is willing to take the compensation under clause (3). That clause should, therefore, be amended by making the minimum three months and the maximum one year and allowing the court a discretion to exceed the minimum on the application of the judgment-debtor.

17. *Order XXI,* rule 37 allows a court to issue a notice calling upon the judgment-debtor to appear before the court on a day to be specified in the notice and show cause why he should not be committed to the civil prison. Complaints have been made against the use of this power and it is said that the issue of this notice is an invitation to abscond which is usually accepted. It has, therefore, been suggested that this provision should be deleted. It seems to us that some such rule is necessary but that many courts misapply it by regarding the issue of a notice as the ordinary procedure instead of the exception.

18. *Order XXI, rule 39.*—Rule 39 deals with subsistence allowance. There seems to be an omission in clause (5). According to clause (1) the decree-holder must pay into court such sum as the judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the court. According to clause (5) sums disbursed by the decree-holder for the subsistence of the judgment-debtor *in the civil prison* alone are allowed to be deemed costs in the suit. There seems to be no definite provision for adding the subsistence allowance allowed in clause (1) as costs in the suit. There is no apparent reason for this omission and if the words " in the civil prison " in clause (5) are taken away, this omission will be rectified.

19. *Order XXI, rule 45.*—Rule 45 deals with agricultural produce under attachment. It provides that where agricultural produce is attached, the court shall make such arrangements for the custody thereof as it may deem sufficient and for the purpose of enabling the court to make such arrangements every application for the

attachment of a growing crop shall specify the time at which it is likely to be cut and gathered. This rule does not provide for the *prepayment* of charges for watching the crops. Experience has shown that, after the attachment is made, delay often occurs in the payment of custodian's fees with the result that, there is nobody to watch the crop for some days. After the attachment the judgment-debtor very often does not take care of the property. He is often accused of having tampered with the property after the attachment, and decree-holders take action against him on such allegations. The crops attached deteriorate and are liable to damage. In these circumstances with a view to avoid unnecessary enquiries it would be well if a rule is made for prepayment of the necessary charges along with the application for the attachment till the time when the crop is likely to be fit to be cut and gathered.

20. *Order XXI, rule 53.*—Rule 53 deals with the attachment of decrees. According to it the attachment is to be made, if the decree sought to be attached was passed by another court by the issue to such other court of a notice by the court which passed the decree under execution, requesting it to stay the execution of its decree unless and until the court issuing the notice cancels the notice, or the holder of the decree sought to be executed or his judgment-debtor applies to the court receiving such notice to execute its own decree. This rule only provides for a notice to the court which passed that decree. But the decree under attachment may have been transferred for execution to a third court. So the order must be sent on to the third court. This causes delay and by the time this attachment order is received by the executing court sometimes the person entitled to the decree sought to be attached executes and realises the money. Therefore, we suggest that after the words " to such other court " the words " and to the court to which it has been transferred for execution " be added and in clause (*b*) (*ii*) to remove the words " its own " and substitute " the attached." Moreover, in clause (*b*) (*ii*) the judgment-debtor under the decree sought to be executed is allowed to execute the decree which means that he can execute even without the consent of the attaching decree-holder or the permission of the attaching court. This leads to unnecessary disputes about the judgment-debtor's negligence in execution and sometimes leads to fraud as the holder of the decree sought to be attached (the judgment-debtor in the other matter) may without the consent of the decree-holder receive part of the decretal amount of the attached decree outside court and make admissions in favour of his judgment-debtor under the attached decree. It seems to us that it should be made clear that that consent or the permission of the attaching court is necessary and, therefore, in clause (*b*) (*ii*) the words " with the consent of the said decree-holder expressed in writing or the permission of the attaching court " should be added.

21. In rule 53, clause (6), it is stated that " on the application of the holder of a decree sought to be executed by the attachment of another decree, the court making an order of attachment under this

rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the court or otherwise, shall be recognized by any court so long as the attachment remains in force." These words " after the receipt of notice thereof either through court or otherwise " have led to trouble; for it has been contended that these words refer to formal service of notice and the word " receipt " is said to indicate this meaning. Therefore, it has been contended often that, though the judgment-debtor may have knowledge of the attachment, yet, if he has not received notice of the attachment, a payment by him is good. It seems to us that mere knowledge should be enough, and it should be open to the decree-holder to show that he had such knowledge. No doubt, this will lead to certain amount of delay in investigating whether he has such knowledge or not. But, it is the decree-holder who will be responsible for such delay and, therefore, that is not a point which need be considered of importance. If he is willing to establish his plea by satisfactory evidence, he should have the fruits of his decree. Therefore, for the words " after the receipt of notice thereof " the words " with the knowledge thereof " should be substituted.

22. *Order XXI, rule 57.*—Rule 57 which was newly introduced into the Code of 1908 has been the subject of many decisions. It runs thus:—" Where any property has been attached in execution of a decree but by reason of the decree-holder's default the court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease." It has been found difficult to state exactly when the attachment ceases upon the dismissal of such an application as is referred to therein and it seems to us that cases are not infrequent in which the decree-holder contends often that the dismissal was not owing to his default but owing to a desire to clear the file. It seems to us necessary with a view to protect innocent purchasers to make it obligatory on the court to state in every order dismissing an execution application in which there is an attachment whether the attachment continues to exist or ceases to exist. That would make it clear to intending purchasers whether there is a subsisting attachment or not. If an order that the attachment ceases to exist is made unreasonably, it will at once give the decree-holder an opportunity to appeal for setting it aside. But at present this question is allowed to be opened and agitated years afterwards to the detriment of innocent parties and of the decree-holder who finds too late that his attachment has ceased. In the interests of all parties we think that the suggested amendment should be made.

23. *Order XXI, rule 67.*—Rule 67 deals with the mode of publishing the proclamation. It says that it should be done in the way in which an attachment of immoveable property is to take

place under rule 54. We would, wth a view to avoid unnecessary delay, suggest that there should be no necessity to send a copy of the proclamation to the judgment-debtor; he was bound to be present on the date on which it was settled and to take notice of it.

24. *Order XXI, rule 72.*—Rule 72 deals with the permission to be obtained by the decree-holder to bid for any property. This rule can be evaded by the decree-holder purchasing the property *benami*, and getting a transfer from the ostensible transferee. There does not seem to be much necessity for retaining this rule now and it seems to us that it would be enough to prevent fraud or undue pressure by the decree-holder if the judgment-debtor is allowed in a particular case to obtain an order that the decree-holder should not in the circumstances stated in his affidavit be permitted to purchase. The rule has not prevented the decree-holder from purchasing the property when he really wants it; but, on the other hand, it only leads to frivolous applications by the judgment-debtor to set aside the sale saying that the purchase is *benami* for the decree-holder and so invalid. Sometimes notices under this rule take a long time to get served and execution is delayed thereby.

25. *Order XXI, rule 75.*—Rule 75, clause (2) deals with the sale of a crop which from its nature does not admit of being stored. The Punjab High Court has applied that rule to cases where the crop can be sold to greater advantage in an unripe state such as green wheat or gram. It seems to us it will facilitate execution if that rule is adopted by the other provinces also.

26. *Order XXI, rule 94.*—Rule 94 deals with the sale certificate. Much litigation has ensued by reason of the carelessness in drafting the sale certificate. It is a very important document. But ordinarily the drawing up of the sale certificate is left to a petty clerk and in most cases there is no control exercised over the drafting. It seems to us that each High Court should prepare a form of sale certificate and that it should be incumbent on or at any rate open to the purchaser to file a draft adapting such form to the circumstances of his particular case.

CHAPTER 31.

Execution. Single execution court. Jurisdiction for execution. Stay of execution. Interest. Execution during court vacations.

1. A very important suggestion that has been made is that, if possible, the work of execution in any particular local area should be concentrated in the hands of a single officer. It is stated that the present system by which each court, of the many situated in one place, does a portion of the execution work of the local area in which it is situated leads to its neglect, that more importance is attached to the disposal of original suits and that work of this sort is often entrusted to clerks. There is substance in this complaint and some method should be found for making the courts attach sufficient importance to this branch of their work. So long as the impression continues that a judicial officer's work is judged mainly by the quantum of original suits disposed of, this neglect is bound to continue. Two important remedies may be suggested for making judges realise the importance of the work in the execution department. One is to make them submit a periodical return showing the number of execution petitions in which satisfaction was obtained, leaving aside petitions which were dismissed for non-payment of fees and other disposals of that sort; secondly, to make such work the prime work of the court so that its attention may not be distracted by other kinds of work. Any system by which one officer in a local area will do all execution work in it will be a move in this direction. The objection to this course, as stated by some, is that there would not be sufficient work to engage the whole of the time of one officer, and secondly there would be questions of pecuniary jurisdiction involved, and thirdly that even if the work is concentrated in the manner suggested it will be neglected by the judge and entrusted to the clerks as before. As regards the first objection, we think if a sufficiently large area is taken, there will be enough work and the additional inconvenience which parties may have to undergo by travelling to the headquarters of such court will be compensated by the closer attention that will be given to their work when they arrive. As regards questions of jurisdiction, in some provinces at least, so far as execution matters are concerned, no question of pecuniary jurisdiction arises for munsifs are allowed to execute decrees much beyond their pecuniary jurisdiction. Even if that cannot be done, we think that this difficulty can be got over by giving such work to an officer who has just entered the subordinate judge's grade. No doubt he may have to deal with some cases of petty execution, and it may be said that it is not economical to engage a high paid officer for such work. But apart from the pecuniary value of the execution petition, the credit of our judicial system is involved in effective

execution, and the little extra cost will be worth incurring for such a purpose. If necessary, this objection may also be met by giving the munsifs concurrent jurisdiction up to, say, Rs. 50, and leaving it to the party to choose their courts or the main execution court. If in such a case the party chooses the less efficient court where there is more delay, he has to thank himself. As to judges continuing to neglect the work as before, each officer has a certain amount of energy and attention to bestow on his work and if execution work has to jostle for his attention with original suits which tell more in the periodical returns on which his capacity is judged, it is likely to be slighted. But if such work is his primary work, as he will be judged by his success in it, he must bestow such energy and attention he has on such work, unless he is altogether neglectful. We therefore recommend this system for trial.

2. As stated in our Chapter 9 (paragraph 13), on " Officers of courts " the experiment of having one execution court for all decrees passed by several courts within a particular area has been tried with much success in Ahmedabad and we think that it will be equally successful in other places.

3. A constant source of trouble and one which leads to uncertainty about the validity of execution sales is the question of jurisdiction of the court to execute. As regards territorial jurisdiction, section 21 of the Code provides in the case of suits that if the objection is not taken before the settlement of issues it cannot be taken later on. The principle of that section which in terms applies only to suits has recently been extended by the Madras High Court to execution proceedings also. It seems to us that this extension should be recognised all over the country, for it would save a number of stale and futile objections to the validity of a purchase in an execution sale or of any order in execution. We go further and suggest that even other kinds of objection regarding jurisdiction should not be recognized unless taken at the earliest possible opportunity in the proceedings in which the order or sale attacked was made. Even as regards pecuniary jurisdiction, such a view will not work much of a change, for as has been said before even munsifs in some provinces, have been held to have jurisdiction to execute decrees beyond their pecuniary jurisdiction. If a person does not take the objection early enough, why should he or those who claim under him be allowed to raise an objection which having regard to the intellectual calibre of even the lowest court at present can at the best be only a question of convenience of arrangement rather than of judicial capacity?

4. Another suggestion that has been made is that instead of asking for the fees payable for the several steps in execution at different stages and at different times it would be well to ask for all the fees at the beginning so that the court may not have to wait for the payment at different stages and thus delay be saved. Against this it may be said that in the case of poor people they may

not be able to collect all the necessary money at the same time. Moreover, execution petitions may fail at different stages for good reasons and all may not reach the end. In such cases there will be the trouble of refunding the unspent amount. We may, however, add that provision can and should be made for the payment by the plaintiff at his own option of all the charges at one time, in cases where he wants to speed up matters.

5. We were informed by one witness who has been a leader of the Bar and has had experience as a judge that cases are not infrequent in which it pays a judgment-debtor to delay payment of the decretal amount even when he is able to pay. This occurs when the decree carries interest at " the court rate "—6 per cent. —though the market rate is more like 12 per cent. We consider that the limits within which the discretion given by section 34 should be exercised might be laid down by a rule of the High Court in each province. To have one " court rate " for all classes of cases throughout India is an arrangement not, so far as we can see, intended by the Code. Nevertheless we doubt whether a rate much higher than six per cent. will be generally approved of for this purpose. Interest on the aggregate amount decreed is generally interest upon interest as regards part of the amount.

6. Stay of execution is another main source of delay at present. The difficulty lies in differentiating between the claims of a judgment-debtor with a real grievance and of one who only wishes to delay. Stay of execution can be made either under Order XXI, rule 26, or under Order XLI, rule 5, or by means of an injunction under Order XXXIX, rule 1. We have already dealt with Order XXI, rule 26. As regards Order XXXIX, rule 1, we think the words " or wrongfully sold in execution of a decree " and certain consequential words should be altogether removed from that rule, for an injunction under that rule practically negatives the right of the decree-holder in most cases. The court that can best know whether the execution should be stopped or not is the executing court. A person who has filed a suit can very well apply to the court executing the decree to stay its hand pending the result of the suit, if he is a party to the decree. He should not be allowed to ask a court which knows nothing and can only act upon affidavits till a very elaborate enquiry is held, to stay the hands of another court often superior in grade. It may be that in certain cases the executing court may wrongly refuse to stay execution but that can be remedied by an appeal against the order and by applying to the appellate court to stay the execution under Order XLI, rules 5 and 8. If the appellate court refuses to stay execution, the case is not one for the issue of a temporary injunction under Order 39, rule 1. In these circumstances we think that if the applicant under Order XXXIX, rule 1, is a party to the decree there is absolutely no necessity to invest a third court with power to stay execution. If he is not a party to the decree then his interests

will not be affected by the sale and therefore there is no necessity to stop the sale at all. At the worst it may happen that he may be put out of possession in execution by the purchaser. But he can object to the delivery of possession and if there is any substance in his claim he would not be disturbed; for that will be a case to which Order XXI, rule 99, will apply. We therefore suggest that the power to grant a temporary injunction under Order XXXIX, rule 1, to stay execution of any decree should be taken away. As regards the stay of execution under Order XLI, rule 5, the law, as it stands, is quite enough, and the difficulty seems to arise only because a wrong exercise is sometimes made of the powers under it. We would draw the particular attention of the courts to clause 3 of that rule which says that not only the conditions in clauses (*a*) and (*b*) of that clause should be satisfied but that security should be given for the due performance of the decree or order as may ultimately be binding upon him. The word "and" used between clauses (*b*) and (*c*) should be specially noted. If the power to ask for security is properly exercised and if in proper cases the security is made to take the form of money deposited in court there will be little room for complaint. In this connection we think that the practice which seems to have grown up in the Punjab of asking for security from the decree-holder for restitution under Order XLI, rule 6, seems to be a source of genuine grievance. We think that such a practice has little to commend it, though the power is a useful one for special cases. Ordinarily a stay should only be given on the terms laid down by rule 5. An order under rule 6 means that unless the respondent finds security, the court is prepared to stay execution, *i.e.*, without putting the appellant upon terms. To utilise rule 6 as a common-form method is merely to abrogate the provisions of rule 5. The consequence will often be that a defendant with no real defence will succeed in making the plaintiff find security, and then further proceed to litigate with him in execution. It seems undesirable that rule 6 should be applied save in cases in which the plaintiff has succeeded in attaching property which is admittedly the judgment-debtors and which he can at once proceed to sell.

7. Advantage is often taken by dishonest judgment-debtors of the annual vacation and other continuous holidays like the Easter and Christmas holidays to alienate their properties or to leave the jurisdiction of the court which can issue execution against them, in anticipation of execution petitions to be filed on the reopening of the courts. In several provinces, for example, Madras and the Central Provinces and the United Provinces no arrangement is made for the reception and ordering of emergent petitions for execution during such holidays. In fact in Madras this is expressly prohibited. In the Punjab petitions can, it seems, received during the vacation by the clerk and dates can be fixed by him for hearing by the judge. But it is not clear from the printed rule that the judge can or is bound to make any order on it during the vacation. It is not rare to find persons

who are evading service of arrest warrants, almost vaunting their ability to defeat the court and the decree-holder. In the cases where the decree is passed just before the vacation the injury done is really substantial. Even the most diligent decree-holder in many cases is unable to prevent the judgment-debtor converting immovable property which the creditor can easily reach into money which can easily be concealed. We would, therefore, recommend that in provinces in which no such arrangement is now made, at least one judicial officer, with sufficient pecuniary jurisdiction in matters of execution of decrees, or several by turns, be invested with powers and entrusted with the duty of receiving and making such orders as are urgent on execution petitions, irrespective of his territorial jurisdiction within the district, during the entire period of the holidays. We understand that some such provision is usually made in some districts in Bombay by administrative orders of the district judge. It may be provided that as soon as the court which will ordinarily have jurisdiction to deal with it reopens, the petition will stand transferred to it for further proceedings. The officer so selected may be directed either to remain at his headquarters or to attend court at his headquarters on fixed days in the week. He may be compensated by being given the right to get privilege leave on full pay, for the whole or part of the holidays so lost by him as in the case of Vacation Judges of the High Court. We think that similar arrangements should also be made when a judge is temporarily absent on leave, and no substitute is appointed, by placing another officer of the same class, if possible, to be in charge of his court for such emergent work.

CHAPTER 32.

Execution. Simple mortgage decrees. Rules as to separate preliminary, final and personal decrees.

So far we have dealt mainly with simple money decrees which, as we said, form the most numerous class of decrees sought to be executed. The mortgage decrees and decrees analogous to them based on a charge or a lien form the next numerous class. The difficulty in these classes of cases is not so serious as in the case of the money decree. For there is some property for the decree-holder to go against and in several cases he gets nearly all that he is fairly entitled to. But in a number of cases, he has to have recourse to other properties of the judgment-debtor after the security has been exhausted and in that case he becomes an ordinary money decree-holder. During the period which is usually allowed in a mortgage decree for the payment of the amount decreed and during the time which, under the present Code, the mortgagee has to spend in obtaining a " final decree " the mortgagor is in several cases active in alienating his other properties and converting them into money, so that the decree-holder may not get anything more than what can be obtained by the sale of property charged or mortgaged. A number of witnesses have suggested that no time at all should be given for the payment of the amount decreed. In certain provinces several judges seem to think that they are bound to give all the six months allowed under Order 34, rule 2 (*c*). Between these two extremes there is a large body of opinion with which we agree that some time should be given, though it need not always be six months, and that it should be left to be determined in each case what the period should be. This will depend largely upon the sufficiency of the security given and the rate of interest allowed under the mortgage.

2. A large body of opinion is in favour of the suggestion that it should not always be necessary to have two decrees, a preliminary and a final decree. Before the new Code of 1908 courts were passing decrees both preliminary and final and even personal decrees at the same time. There was no necessity to apply again, after the date fixed for payment, for a final decree and, after the property was sold, for a personal decree. Most of the gentlemen who have given evidence before us agree that there should be a reversion to that state of affairs. We think, however, that this should not be made an inflexible rule. There may be cases, where, at any rate, so far as the personal decree is concerned, determination as to whether one should pass such a decree or not would involve taking evidence and hearing elaborate arguments as to questions of limitation which may after all prove unnecessary if the mortgaged property fetches a proper price. In such cases it will be needless waste of energy and power to ask the court to determine that question at that stage. We would, therefore, leave it to the discretion of the courts to pass all the three decrees together if the

plaintiff wants it, or ask him to file separate petitions for the same according to the circumstances of each case.

We would make it clear that a mortgage decree-holder can attach the other properties of the mortgagor during the time that a mortgage decree is being executed by the sale of the mortgaged property. Often it is found that the property mortgaged is not sufficient to repay the entire mortgage decree amount and pending such a sale it often pays the judgment-debtor to sell his other properties and secrete the proceeds. The mortgagee finds, after the sale is over, that he has much yet to realise, but nothing to realise it from. ' It is, therefore, necessary in such cases that the court should have power even before the sale is held under the mortgage decree to attach other properties of the judgment-debtor to realise whatever balance may be due after the sale. This power should be given not only in cases where the decree under execution itself contains a personal decree but also in cases where a further petition for such a decree has to be filed.

3. A defect somewhat common in the form of decrees in this country and one which leads to constant delay is the omission to provide for the realisation of money charged under the decree on immovable property by the execution of that very decree. Often the decree merely runs to the effect that the defendant shall pay a certain amount to the plaintiff and that the payment is charged on the immovable property specified in the schedule of the decree. Certain courts hold that this merely gives a charge and there should be a further suit on the charge. This seems to us an unnecessary elaboration of procedure. We think it should be made clear that where a decree orders a payment of money and charges it on immovable property, on default of payment the amount can be realised by the sale of that property in execution of that very decree.

CHAPTER 33.

Execution. Registers and Returns. Preservation and destruction of records.

1. The recommendations that we have made in the previous chapters on execution necessitate that the records kept in the court relating to the various stages of the execution proceedings should be accurate and sufficiently full to enable it to have a clear idea of the length of the proceedings, the various steps that have already been taken to satisfy the decree, and of the causes that have led to full satisfaction not having been obtained. Generally stated, the records now available for such a purpose in the several provinces consist, besides the applications for execution and the orders thereon and other papers connected therewith, of (1) the entries made in the register of suits, (2) the entries in a register called the register of execution applications, and (3) the periodical returns submitted as to the institution and result of the applications for execution. When an application for execution is presented, it is usual in all provinces for it to be checked by reference to the entries in the first two registers. For the purpose of having a clear view of the history of an execution proceeding, the entries in the register of execution applications are not sufficient as they are isolated for each particular application, and usually contain insufficient references to previous applications. The history is more fully sketched in the entries in the suits register.

2. These are usually as follows:—

1. Date of application.
2. Date of order.
3. Against whom.
4. For what, and amount, if any.
5. Amount of costs.
6. Amount paid into court.
7. Arrested.
8. Minute of other return than payment or arrest, and date of every return.

This is the form used in Bengal and with immaterial variations in Bihar and Orissa, and in Burma. In Madras the following additional information is given, *viz.*, the number of the application and not merely the date of it; the order itself and not merely its date, in column 2. The person arrested is definitely referred to in column 7, and in column 8 entry is made as to the order in appeal, if any, against the orders made in execution. We think, however, that even this is not quite enough. In none of these forms are the reliefs sought in the petition itself and the amount for which a decree is sought to be executed, given, so as to show how much of the relief claimed was allowed or rejected. If a portion has been rejected, there may be a question of *res judicata*. Nor is there any provision in this form for the recording of any adjustment or satisfaction reported, if any, when no execution application is pending. There is also nothing to show the reason for dismissal of a particular application. Information is not given as to the amount due

on a decree at a particular stage. We recommend that the following form may be adopted in all provinces for the several entries in the suits register:—

1. Number of execution application as per execution application register and the date of application.
2. Relief sought. If money, amount claimed.
3. Order and date thereof. If portion of relief not granted, what portion.
4. Against whom order made.
5. For what, amount to be stated.
6. Amount of costs.
7. Adjustments and satisfaction reported, if any.
8. Amount paid into court.
9. Persons arrested.
10. Whether judgment-debtor committed to jail; if not, why not. If committed to jail, period of stay in it.
11. Minute of other return other than arrest and payment.
12. Amount or relief still due, and why execution petition is closed.
13. If petition infructuous why and to what extent.
14. Appeal, if any, against order in execution, and if so, the result.

3. In order to make presiding officers supervise the careful preparation of the suit registers we would recommend that they should send a certificate monthly to the district court that they have examined the records of at least 10 per cent. of the execution applications finally disposed of in the month, and have satisfied themselves that the necessary information relating to them has been entered in the suit register. This certificate may be appended to the monthly return to which we refer later.

4. As regards the register of execution applications, the information given varies in different provinces. In some it is full, in others it is less full. We think the Punjab form which is printed as Form I in the appendix to this chapter is the most comprehensive and we recommend that in other provinces the registers may be so modified as to contain all the columns found in it.

5. Of equal importance is the close supervision of the execution work. Although we are not in favour of requiring returns, unless they are absolutely necessary, we think, in the present circumstances, that a periodical return is required here as the best method of checking the work. We find in some provinces the execution work of a court comes under review by a superior court only once a year. In others it comes quarterly. In Bombay execution returns are a part of the monthly return for all civil work. In Bengal, separate monthly returns are submitted in the form printed as Form II of the appendix to this Chapter and we recommend the adoption of the Bengal system in all provinces.

6. But we would slightly modify that form. We would split up column 9 into two, (9) being given the heading " through court " and 10 " under Order XXI, rule 2 ". We would also similarly split up column 10. As regards column 11, we would split it into two, (13) being " withdrawn, not prosecuted or rejected," (14) being " wholly infructuous otherwise." We would also add another column which is used in Madras as columns 30 and 31 in which the following particulars should be given:—" Days for which applications in columns 9 to 14, were pending " (*a*) " in the aggregate " (*b*) " in the average ". As amended the form will be Form No. III in the appendix to this Chapter.

7. The columns in this return, as amended, will, we think, give all the information necessary to test the work of an officer. We suggest that all superior courts should make their subordinates realise that the submission of this return is not a mere matter of routine to be attended to by the office, but that the work referred to therein will be considered quite as important as the trial of suits.

8. Another matter connected with the execution of decrees which require notice is the preservation and destruction of the records relating to the service on the defendant before decree and of those recording proceedings subsequent to the decree. The rules differ in different provinces on this point. The suits register is generally preserved longest. In some provinces it is preserved for " *ever* " in the case of at least some classes of suits. Amongst the papers kept for the shortest period is the summons to the defendant before decree. For example in the Punjab in all classes of suits this is kept only for one year, and in no province is this kept for over 12 years in any class of suits. In some provinces a difference is made between a suit decided *ex parte* and one on consent, and in a few provinces there is a different rule for suits relating to land and mortgages and suits for money or rent. In several provinces distinction is made between decrees in regular suits and those in small causes suits. We do not wish to lengthen this report by referring to the rules in detail. In cases where the decree is passed after contest or after the defendant has appeared once, the destruction of the summons to him is of little consequence, but in the case of decrees passed without his having appeared, early destruction makes it difficult to determine whether the decree was obtained by fraud, or not. The recommendation that we have made to delete the provision for an application to keep alive the decree will make it even more important that this record should be kept and made available at least so long as the decree is capable of execution. Mere entry of the nature of the return of summons in the suits register is not enough. What is wanted is the original return in case fraud or forgery is pleaded.

9. In some countries we understand that the records of all proceedings before decree are made part of the decree and are preserved with it. This would, however, unnecessarily encumber the records. We think it will be enough if the last summons on the basis of which the court held that the defendant had been duly

served and decided to proceed in his absence under Order IX, rule 6 (*a*) and the return and the order thereon, with the identifier's affidavit, if any, are preserved till any of the following events happen in the case of *ex parte* decrees:—

(1) the full satisfaction of the decree is reported by the decree holder or is entered after enquiry, or

(2) the judgment-debtor appears in the execution proceedings, if he does not question the service on him, or his objection to the service is determined finally, or

(3) the decree becomes incapable of execution under section 48, Civil Procedure Code.

In most suits there will be only one or two such summonses and their preservation will, therefore, not make an undue demand on the space in the record room. It is unnecessary to preserve any but the last summons as all previous summonses must be deemed to have been not duly served when the last was issued.

10. As to the suits register, we think it should be preserved at least as long as any decree registered in it is capable of execution, in all classes of cases, even if for over 12 years. The rules in most of the provinces provide for this now.

11. As regards the register of execution applications, and the records relating to them, the rules now in force provide for their very early destruction in some provinces. We, however, do not think it will be necessary to amend this rule, if the changes we have proposed as regards the entries in the suits register are carried out.

APPENDIX TO CHAPTER 33.

FORM No. I.

Register of applications for the execution of decrees.

1	Serial Number.		
2	Date of application.		
3	No. of suit, date of decree, and court by which passed.		
4	Original or appeal.		
5	Names of the parties to the suit in which decree passed.		
6	Name of person applying for execution.		
7	Name of person against whom application for execution has been made.		
8	Amount of property decreed and nature of the decree.		
9	Whether any and what adjustment has been made subsequent to decree.		
10	Amount for which execution is now sought.		
11	Mode in which assistance of court is required.		
12	Amount realised.	By delivery of property specifically decreed.	
13		By payment voluntarily into court.	
14		By attachment and sale of property.	
15		After arrest and imprisonment.	
16		Total.	
17	In the case of immovable property.	Date of issue of certificate under section 316.	
18		Date of sending copy to registering officer.	
19	Cause of non-completion of execution.		
20	Date on which the case of execution was struck off the file and purport of the final order.		
21	Name of officer passing final order.		
22	Remarks.		

FORM No. II.

PART (1).

Monthly statement showing the result of proceedings on Applications for Execution of Decrees in the Courts of the of during the month of 19 .

Class of suits the decrees in which were under execution.	NUMBER OF APPLICATIONS DEALT WITH.					APPLICATIONS DISPOSED OF.[2]								NUMBER OF APPLICATIONS.												REMARKS.
	Pending at the end of	Filed.[1]				Transferred						Pending at the end of	Amount realized.	On which the judgment-debtor was imprisoned.	On which he was arrested under section 55, but released without imprisonment.	On which moveable property		On which his immoveable property			On which specific performance was ordered.	On which possession was given		On which partition was effected, section 54.	On which execution was effected otherwise than in the preceding columns.	
		The decrees being those of the court where execution is taken out.	The decrees being those of other courts transferred for execution.[3]	Restored to file for any cause.	Total.	To another court under section 39.	To the Collector under section 68.	Decrees wholly satisfied.	Decrees partly satisfied.	Wholly infructuous.	Total.					Was sold.	Was attached, but subsequently released under Order XXI, Rule 55.	Was sold.	Was dealt with under Order XXI, Rule 83, Schedule 3, para. 2 or section 72.	Was attached but subsequently released under Order XXI, Rule 55.		Of movables, Order XXI, Rules 35 and 36.	Of immoveables, Order XXI, Rules 35 and 36.			Note the number of entries in columns 4 and 7 where the decrees have been transferred from or to another province.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27
Suits for money or movables.																										
Suits under the Rent Law.																										
Title and other suits.																										
Total for the past																										
Total for the previous.																										
GRAND TOTAL[4].																										

[1] Including verbal applications under Order XXI, Rule 11.

[2] The following cases only are to be entered, (1) those in which, after transfer, an application has been made for execution under Order XXI, Rule 10, and (2) those in which a decree has been transferred for execution by a superior court to a subordinate court of its own motion after an application for execution under Order XXI, Rule 10, has been filed and execution ordered under Order XXI, Rule 17.

[3] *N.B.*—This statement deals only with cases in which an application for execution has been made.

[4] Against this total the entry to be made in column 2 is the number of applications pending at the close of the previous year, and this entry will remain unchanged throughout the year, to which the returns relate. In columns 6 and 13 no entry should be made against this total till the close of the year. No entry should be made in columns 2, 6 and 13 against the " Total for the previous . . " in the line preceding.

FORM No. II.

PART (2).

Details of Pending Applications for Execution of Decrees.

Applications for execution of decrees.	NUMBER OF APPLICATIONS PENDING.			Explanations and Remarks.
	More than three months.	More than six months.	More than one year.	
1	2	3	4	5
In suits for money or movables				
In suits under the Rent Law				
In Title and other suits				
TOTAL .				

FORM No. III.

PART (1).

Monthly statement showing the result of proceedings on applications for Execution of Decrees in the courts of the
of *during the month of* 19 .

Class of suits the decrees in which were under execution.	Number of applications dealt with.					Applications disposed of [2]									Pending at the end of	Amount realised.	Number of applications.													Days for which the applications in columns 9 to 14 were pending.		Remarks.
	Pending at the end of	Filed.[1] The decrees being those of the court where execution is taken out.	Filed.[1] The decrees being those of other courts transferred for execution.[2]	Restored to the file for any cause.	Total.	Transferred To another court under section 39.	Transferred To the Collector under section 68.	Decrees wholly satisfied. Through Court.	Decrees wholly satisfied. Under Order XXI, Rule 2.	Decrees partly satisfied. Through Court.	Decrees partly satisfied. Under Order XXI, Rule 2.	Wholly infructuous. Withdrawn, not prosecuted or rejected.	Wholly infructuous. Otherwise.	Total.			On which the judgment-debtor was imprisoned.	On which he was arrested under section 55, but released without imprisonment.	On which his immovable property. Was sold.	On which his immovable property. Was attached but subsequently released under Order XXI, Rule 55.	On which his immovable property. Was sold.	On which his immovable property. Was dealt with under Order XXI, Rule 83, Schedule 3, para. 2 or section 72.	On which his immovable property. Was attached but subsequently released under Order XXI, Rule 55.	On which specific performance was enforced.	On which possession was given. Of movables under Order XXI, Rule 31.	On which possession was given. Of immovables, Order XXI, Rules 35 and 36.	On which partition was effected, section 54.	On which execution was effected, otherwise than in the preceding columns.	In the aggregate.	In the average.	Note the number of entries in columns 4 and 7 when the decrees have been transferred from, or to, another province.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32
Suits for money or movables.																															
Suits under the Rent Law.																															
Title and other suits.																															
Total for the last.																															
Total for the previous.																															
GRAND TOTAL[4]																															

[1] Including verbal applications under Order XXI, Rule 11.

[2] The following cases only are to be entered, (1) those in which, after transfer, an application has been made for execution under Order XXI, Rule 10, and (2) those in which a decree has been transferred for execution by a superior court to a subordinate court of its own motion after an application for execution under Order XXI, Rule 10, has been filed and execution ordered under Order XXI, Rule 17.

[3] *N.B.*—This statement deals only with cases in which an application for execution has been made.

[4] Against this total the entry to be made in column 2 is the number of applications pending at the close of the previous year, and this entry will remain unchanged throughout the year, to which the returns relate. In columns 6 and 16 no entry should be made against this total till the close of the year. No entry should be made in columns 2, 6 and 16 against the "Total for the previous " in the line preceding.

FORM No. II.

PART (2).

Details of Pending Applications for Execution of Decrees.

Applications for execution of decrees.	NUMBER OF APPLICATIONS PENDING			Explanations and Remarks.
	More than three months.	More than six months.	More than one year.	
1	2	3	4	5
In suits for money or movables				
In suits under the Rent Law				
In Title and other suits				
TOTAL .				

CHAPTER 34.

Administrative control. Circular Orders. Rules. Order sheets. Returns. Inspections. Registrars of High Courts. Rule Committees.

1. Administrative control over civil courts in India is under the law primarily the charge of district judges. Under the Letters Patent and Local Acts, in cases where each is applicable, the final responsibility for administration is with Chartered High Courts, Chief Courts and Judicial Commissioners. At the moment there are no Chief Courts in India, but in the near future there will probably be a Chief Court for Oudh, if not also for Sind. Final control in financial and certain other matters vests in the Crown, and is exercised by the Government of India and the Local Governments.

2. The nature of control by the district judge does not vary perceptibly in any part of India. He is responsible for the working not only of his own court, but of all courts subordinate to him within his local jurisdiction. Judicial Commissioners, as a rule, keep higher administration in their own hands, although in some places administrative functions are delegated to Additional Judicial Commissioners. In the High Courts the arrangements for administration vary. In some High Courts the Chief Justice retains these duties almost entirely. In other High Courts the administration of subordinate courts is delegated to some extent to one of the Puisne Judges, who is usually called "The Judge in the English Department" or "The English Judge." The name of the office dates back to the time of the Sadr Diwani Adalat, and is probably derived from the fact that, correspondence with the district judges being conducted by the English Department, the Judge in charge of the administrative duties was also the Judge in charge of the English Department. There is in Bengal a committee of judges to assist the English Judge. Matters of great administrative importance are decided finally by the Court as a whole.

We consider that this matter is best dealt with by each High Court for itself and our only recommendation is that the newer High Courts in particular should take occasion to consider systematically their internal arrangements for administration. The Chief Justice has necessarily much administrative work and has to take a somewhat larger share than Puisne Judges in the heavier and more difficult judicial work. Any tradition which throws upon him too large a share of the administrative control of the lower courts should be critically reviewed. An "English Judge" and an "English Committee" are, we think, the most generally suitable means by which the responsibility of the court as a whole may be given effect to in administrative matters.

The preparation of cases for orders is entrusted to the registrar who is the chief staff officer of the Court. The duties of registrars vary considerably in different High Courts and Judicial Commissioners' Courts.

3. Control over subordinate courts is exercised in three ways:—

(1) By the issue of circular orders, rules and letters.

(2) By the preparation by the subordinate courts of returns which are examined by the superior courts.

(3) By inspection.

Circular Orders and Rules.

4. Circular orders and administrative rules are not prepared in the same manner in all places. The main rules and circular orders of the Calcutta High Court for the guidance of the courts subordinate to it are contained in one volume which was brought up to date in 1918. The Patna High Court rules which were framed in 1916 were brought up to date in 1922. The rules of the High Court of Madras have not been issued authoritatively in book form although there are manuals which are semi-authoritative. The Bombay rules are contained in a manual which was issued in 1912. The Sind rules were prepared at the same time. The rules of the High Court of Allahabad were issued in 1911 and have since been over-hauled, but no new edition has been published. The Oudh rules were framed in 1912. The Punjab High Court has not yet issued rules, but uses the rules of the former Chief Court. In Burma no rules have yet been prepared, but it is proposed to prepare them shortly. The rules in use are the rules of the old Chief Court and the Judicial Commissioner of Upper Burma. The rules of the Judicial Commissioner of the Central Provinces were brought up to date in 1920.

In respect of rules and circular orders there is much to be done. Everywhere they should be brought up to date, and republished at frequent intervals in a serviceable form. The copies of the manuals in the subordinate courts are frequently in a hopelessly confused state owing to amendments and additions.

In some of the older editions of the manuals the text is almost lost under a mass of correction slips, and it is difficult to discover what the present rules are. In certain places the indexing can be improved. This subject is worth attention.

We suggest that it will be a great advantage if each High Court examines what has been done by other High Courts in the matter of rules and circular orders. It is not suggested that there should be absolute uniformity. Local conditions are such that there will necessarily be divergence of practice. We have, however, noticed valuable matter in the rules of certain High Courts which is omitted in the rules of the remainder, and consider that much will be gained by all High Courts examining for themselves exactly what is the practice in other parts of India. To give one example, certain High Courts have found it desirable to give instructions to

the subordinate courts as to the conduct of proceedings in the trial of suits. These instructions are to give guidance to the lower courts as to the manner in which they may best apply the rules laid down by the Code of Civil Procedure. It is a point for consideration whether every Court should not lay down instructions of a similar nature. We have found that there are few subordinate courts in India that are not in need of guidance on the subject.

5. The nature of the subjects covered by these rules can be understood by the examination of the headings of the manual of the High Court of Patna.

There is a preliminary chapter containing rules as to the times at which courts shall ordinarily sit, rules as to the preparation of the history of cases, the manner in which cause lists are to be prepared, days of sitting, court languages and the like.

The first chapter is on pleadings, petitions and affidavits. The second is on processes and process servers, the third is on adjournments, the fourth on the hearing of suits and examination of witnesses, the fifth on the preparation of judgments and decrees, the sixth on execution of decrees, the seventh on rules as to commissions, the eighth on suits by or against Government or public officers, the ninth on appointment of receivers and the tenth on appeals. These chapters form the first part. The second part consists of special rules under Acts other than the Code of Civil Procedure. The third part lays down rules as to preservation, maintenance and destruction of records. The fourth part lays down rules as to the copying department. The fifth part lays down rules as to fees and costs. The sixth part deals with registers, periodical returns, statements and annual reports. The seventh part deals with legal practitioners. The eighth part lays down rules as to up-keep of libraries, forms, and stationery. The ninth lays down miscellaneous instructions which include the important subject of inspection of courts by district judges, and the tenth part lays down rules as to accounts.

Order sheets.

6. In all courts, save in the Punjab, there is attached to the record of every suit or case a précis which shows what has been done on each date, what are the orders passed, and why they have been passed. This précis is called an " order sheet " in Bengal, Assam, Bihar and Orissa, Agra and Oudh and the Central Provinces, a " B Diary " in Madras, a " Roznama " in Bombay and a " diary " in Sind and Burma. Every-where it serves the same purpose. It is intended to show the history of a suit (or case) from first to last. It contains a note of every order made, and shows the date of and the proceedings on every hearing. It shows amongst other matters the dates on which plaint and the written statement were filed, the dates of adjournments, the dates on which issues were recorded or amended, witnesses examined and the dates of delivery of judgment and of signing of the decree. Thus every

suit or case has attached to it a history of the proceedings therein, and it is from this that most of the information required in the registers is collected.

Order sheets are generally prepared properly. The information given in them is usually ample. In most provinces they are written in English. It would be advisable to have them written in English in all provinces. It should not be difficult to obtain the services of English writing clerks for the purpose.

In the Punjab, however, there is no " order sheet " in the sense in which the term is understood elsewhere. The orders are spread over the record, and are inserted, as the occasion arises, among the day's proceedings. There is an index at the beginning of the record from which the orders can be traced. We recommend that in the Punjab an order sheet should be prepared, as it is prepared in other provinces.

Returns.

7. The Government of India require certain statistical information which is finally incorporated in the Imperial tables that find a place in the " Statistical Abstract for British India." This is laid annually upon the table of the House of Commons.

The information given by these statements is not comprehensive enough to enable the superior courts to exercise effective supervision over the work of the courts subordinate to them. This fact has been recognised by all High Courts and Judicial Commissioners and supplementary information is usually given, but this supplementary information is not always sufficient. The Imperial statements, as they now stand, contain no information on the important subject of execution. The information is, however, supplied by other returns prepared and published annually.

A very clear distinction must be drawn between the information which the Statistical Department requires for the Indian and the British public to show the progress of Civil Justice in India and the information which the High Courts themselves require for the purpose.

It is not for us to suggest that the information required by the Government of India should be amplified to any great extent. But we venture to suggest that in certain small particulars this information may be amplified so as to bring out essential points clearly. The addition of the particulars in question will entail no extra labour, as the information is in the possession of the High Courts, and will involve little extra cost. In the returns required by the Government of India for statistical purposes, it is absolutely necessary not only that there should be uniformity in preparation, but that there should be strict compliance with the forms laid down by the Government of India. At present there is a divergence of practice which makes some of the information unreliable. We refer in particular to the system of calculating duration, the definition of

contested and uncontested cases, and the definition of miscellaneous cases. The best method to obtain uniformity would be for the Government of India to consult all the authorities which supply the information, and, after discussion with them on the points, to lay down specific instructions as to how these figures are to be prepared.

8. The forms for the returns required by the Government of India for the preparation of the Statistical Abstract have recently been modified. The old forms were used in the annual returns of 1922. The new forms have been ordered to be used in the returns of 1923. The modifications make for a slight reduction of the information given. These forms will be taken seriatim.

9. No. 25 gives the number of judicial divisions and the number of officers exercising appellate or original jurisdiction both criminal and civil in British India in the year under report and is divided into the following headings:—

1. Province.
2. Number of divisions for courts under Chief Courts but superior to Chief District Courts.
3. Number of districts.
4. Number of sub-districts.
5. Number of officers exercising original or appellate jurisdiction sub-divided into:—
   - (*a*) Judges of Chief Court of the Province.
   - (*b*) Judges of other courts superior to Chief District Courts.
   - (*c*) Judges of Chief District Courts.
   - (*d*) Judges of District Courts other than Chief Courts.
   - (*e*) Judges of other subordinate courts.

This is the present form, which has now been ordered for universal use. In the past, High Courts and Judicial Commissioners have not always kept this exact form. The result of deviation from it has been to detract from the value of the information given in the returns. The figures given under the heading of judges of " other courts superior to Chief District Courts " are misleading. The information given by this form is usually accurate on the civil side, although the number of civil courts is exaggerated in certain provinces by the inclusion of courts, which perform civil duties during a portion of their time, and criminal and executive duties during the remainder.

10. No. 26 gives the number of cases decided and the receipts and charges of the courts. The main headings are:—

1. Province.
2. Number of cases decided.
3. Total receipts of courts.
4. Total charges of courts.

Civil cases decided are divided into original and appellate and again sub-divided into regular and miscellaneous. As the figures of receipts and charges are the receipts of civil and criminal courts taken together, they afford no indication as to the actual receipts and charges of the civil courts. This form is prepared from the information given in Judicial Statements No. 9-Civil, Parts 1 and 2, No. 10-Civil, Parts 1 and 2 and certain criminal statements. The figures of receipts and charges are not invariably given in the High Court annual reports.

As the figures of receipts and charges are required by the Government of India returns they should be given. We have to note, however, that these figures as prepared are of little value. For example in the Civil Justice report for the province of Agra of 1922 total receipts of all courts are shown as Rs. 1,11,43,611 and total charges are shown as Rs. 1,12,83,108. In the column of remarks it is stated that these figures "relate to the combined receipts and charges of civil, criminal and revenue courts including a share of charges of district administration." The information required is in respect of the receipts and charges of civil, criminal and revenue courts taken separately, to show the results of the working of each class of court. Further we are given to understand that in respect not only of these particular figures but in respect of the figures, wherever supplied, items of importance are excluded. For example deterioration of buildings, furniture and equipment are not calculated. Pension charges are omitted.

We appreciate the difficulty in analysing income and expenditure, so as to attribute an exact figure to (*a*) civil justice (*b*) criminal justice, especially where the existence of revenue courts introduces a complication. Still we would insist that no useful purpose is served by publishing meaningless or erroneous figures. This question should be examined by competent financial authority. If possible, certain principles should be laid down for the allocation of disputable items as between civil and criminal justice.

11. No. 27 gives the number and description of civil suits instituted. It corresponds to Judicial Statement No. 7-Civil. The old table used to divide the suits by provinces into (1) Suits for money, or movable property, (2) Suits under the Rent Law, subdivided into (*a*) suits for arrears of rent, (*b*) suits for enhancement or abatement of rent, (*c*) suits for penalties, damages or compensation for unlawful acts on the part of landlords or tenants (*d*) suits for ejectment or recovery of possession, and (*e*) other suits under the Rent Law.

The present statement omits sub-heading (*c*). The third heading (3) is Title and other suits. This was formerly sub-divided into the following headings:—

(*a*) Suits for immovable property.

(*b*) Suits for specific relief.

(*c*) Suits to establish a right of pre-emption.

(*d*) Suits on mortgages.

(*e*) Suits relating to religious and other endowments.

(*f*) Matrimonial suits.

(*g*) Testamentary suits.

(*h*) Other suits not falling under previous headings.

The present form retains only sub-headings (*a*), (*b*), (*d*) and (*h*) and omits sub-headings (*c*), (*e*), (*f*) and (*g*). It is to be noted that it is only in Bengal and Assam, Bihar and Orissa and the Central Provinces that civil courts decide suits under special Rent Laws. In Bombay, Agra and Oudh and the Punjab and the North-West Frontier Province they decide none. In Madras they decide practically none, and in Burma there is no special Rent Law.

12. No. 28 gave the number and value of civil suits instituted under the valuations of below Rs. 10, Rs. 10 to Rs. 50, Rs. 50 to Rs. 100, Rs. 100 to Rs. 500, Rs. 500 to Rs. 1,000, Rs. 1,000 to Rs. 5,000, Rs. 5,000 to 10,000, Rs. 10,000 to Rs. 1,00,000, over Rs. 1,00,000 and the number of suits the value of which cannot be estimated in money. The new form gives separate valuations up to Rs. 5,000, and then valuations for over Rs. 5,000. It corresponds to Judicial Statement No. 8-Civil.

13. No. 29 contains most of the information given in Judicial Statement No. 9-Civil. It shows the result of trials of civil and revenue cases in the courts of original jurisdiction. By revenue cases is meant such revenue cases as are heard by civil courts. The figures do not include revenue cases heard by courts other than civil courts. The headings were previously as follows:—

1. Total number of suits before courts.
2. Number of suits disposed of by transfer to other courts.
3. Without trial.
4. Without contest, (*a*) compromised, (*b*) decreed on confession, (*c*) decreed *ex parte*, (*d*) dismissed *ex parte*.
5. On reference to arbitration (*a*) in favour of plaintiff, (*b*) in favour of defendant.
6. With contest, (*a*) in favour of plaintiff, (*b*) in favour of defendant.
7. Pending at the close of the year.
8. Number pending more than three months at the close of the year.
9. Average duration of (*a*) contested, (*b*) uncontested suits.

This form has been very much reduced. It is now divided into the following headings:—

1. Number of suits before the courts.
2. Number of suits disposed of (excluding transfers) (*a*) without trial, (*b*) without contest, (*c*) with contest, (*i*) in favour of plaintiff, (*ii*) in favour of defendant, (*d*) on reference to arbitration.
3. Pending at the close of each year.

The information afforded by this form might, it is suggested, be supplemented with advantage by the addition of the following columns:—

(*a*) Number of suits pending at commencement of the year,

(*b*) Number of suits instituted during the year,

(*c*) Number revived,

and by a column at the end giving the "number of suits undecided at the end of year pending for more than a year." Little is learnt from the figure of suits pending more than three months. Much is learnt from the figure of suits pending more than a year.

14. No. 30 corresponds with Judicial Statement No. 9-Civil, Part 2. It deals with miscellaneous cases. The headings are the same as in Table No. 29 and the changes that have been made are also the same. The same remarks apply as have been made in reference to Table No. 29 with this addition. We have noticed that the number of miscellaneous cases in Madras is out of all proportion greater than the number in any other province, and have discovered that this variation is due to the Madras system of tabulation, which includes as miscellaneous cases many matters which are not considered cases in other provinces, such as an application for an adjournment made in the course of a suit.

15. No. 31 gives the information given in Judicial Statement No. 10-Civil. It refers to appeals from decrees. The present headings are:—(1) number of appeals before the courts, (2) number of appeals disposed of (excluding transfers); (*a*) dismissed, (*b*) confirmed, (*c*) modified, (*d*) reversed and (*e*) remanded, (3) pending at the close of the year.

It is suggested that information should be given as to the appeals pending at the beginning of the year, the number of appeals instituted during the year, and the number of appeals pending for more than a year.

16. No. 32 gives information which is given by Judicial Statement No. 10, Part 2, in respect of miscellaneous appeals. The same remarks apply as apply to Table No. 31.

17. We now come to the supplementary information which High Courts should prepare and publish annually. Some High Courts publish already practically all the information which can be required. But there are omissions in other places, and there is no uniformity either as to the method of preparing the figures, or as to the particulars given. Uniformity in method will usually be obtained in the supplementary statements, if uniformity is obtained in the preparation of the Imperial returns. It is necessary that there should be uniformity in preparation. We do not suggest that all provinces should give the same supplementary information. Some will wish to give more than others. But there is a minimum of supplementary information, which in our opinion should be given everywhere, and we indicate this minimum in the next paragraphs.

18. Tables should be prepared to show in the case of the High Courts exercising original jurisdiction:—

(*a*) the number of original suits pending at the beginning of the year,

(*b*) the number instituted during the year,

(*c*) the number revived and received by transfer during the year,

(*d*) the number disposed of during the year,

(*i*) without contest,

(*ii*) with contest,

(*e*) the number undisposed of at the end of the year,

(*f*) the figure of duration.

Tables should be published annually with the same headings showing the figures for—

(1) Appeals against the decision of a single judge of the High Court in exercise of original jurisdiction including insolvency.

(2) Appeals against the decision of a single judge of the High Court in exercise of appellate jurisdiction.

(3) Appeals against the decisions of a Bench in exercise of appellate jurisdiction where there has been a difference of opinion.

(4) Appeals against original decisions of subordinate courts.

(5) Appeals against appellate decisions of subordinate courts.

(6) Revisions under section 25, Provincial Small Cause Courts Act.

(7) Other revisions.

In respect of revisions further particulars should be given. It is even more important to know in the case of revisions than in the case of second appeals how many applications failed on presentation and how many failed after contest. Under these heads the figures should be given of the total number of applications and the number summarily dismissed, the number in which notice was issued showing the numbers in which the application was completely successful, in which the application was partially successful and in which the application was eventually rejected.

19. A table should be prepared in all provinces showing the result of proceedings in execution of decrees in all courts. The best form that we have discovered for such a table is IV-D, in the Bengal Report of 1922. It gives the number of applications filed, the number disposed of under the heads of complete satisfaction, partial satisfaction and complete failure, the number of applications pending, the number pending over a year and the amount realised.

20. It is further necessary that everywhere there should be a return showing the result of insolvency proceedings. The best

form that we have seen is the form which appears in the Bengal Report of 1922 and we recommend the adoption of this form with an addition which has been suggested in the Chapter on Insolvency to show separately the number of pending insolvencies and the number of discharges under the Act of 1920.

21. Information should be supplied by the subordinate courts in respect of interlocutory injunctions, and the particulars should be published in the annual reports. We have found that the practice of presiding officers of subordinate courts in granting interlocutory injunctions *ex parte* leaves much to be desired, and we deal with this matter in Chapter 45.

In preparing the figures in respect of interlocutory injunctions the courts should supply information as to the number of instances in which an application was made for the issue of an injunction, the number of instances in which an injunction was granted *ex parte*, the number in which an injunction was continued till the trial of the suit after hearing the defendant, the number in which it was dissolved after hearing the defendant, and the duration between the date of the *ex parte* order and the date of decision in the presence of the defendant.

22. Information is also required as to orders in respect of stay of proceedings in trial, and stay of proceedings in execution. Such stay is usually the result of orders of superior courts in appeal or revision. The information had best be given by the courts whose proceedings have been stayed. The following particulars are required:—

(*a*) The Court which ordered the stay.

(*b*) Whether the stay was ordered.

(*i*) in appeal

(*ii*) in revision

(*iii*) otherwise.

(*c*) Whether the stay was ordered *ex parte*.

(*d*) Whether if ordered *ex parte* it was continued or dissolved after hearing the other side.

(*e*) Duration of stay.

(*f*) Whether the stay was dissolved automatically on failure of the appeal or revision.

23. There is one very useful form of return which was formerly prepared in several provinces, but which is now being abandoned gradually. This is a return which shows the amount of work done by each individual court. It shows in the case of a district and sessions judge his work under the heads of decisions of original civil suits, applications for execution of decrees, miscellaneous cases, appeals, sessions trials, criminal apppeals and applications for revision. It shows for subordinate judges the number of original civil suits decided by them with the figure of contest,

applications for execution of decrees decided, similar figures for small cause court suits, miscellaneous work, the number of appeals decided and the criminal work done, if any. It gives corresponding details in respect of munsifs. The best form in use was in our opinion employed by the Allahabad High Court and the Judicial Commissioner of Oudh. This will be found in the Reports of 1922. The advantage which it possesses over the forms employed in other provinces is that it shows the whole work of a court—not only its civil work but criminal work. It is true that the High Courts are not concerned, in civil reports, with the amount of criminal work done, but in order to appreciate the efforts made by individual judges it is necessary to know the amount of criminal work done. We suggest the following modification of this form. It should show, in addition to the information already given, the work left for disposal from the previous year, the figures of institution, restorations and cases received by transfer, the figures of the work left undecided at the close of the year and the number of cases left undecided which had been pending over a year.

24. The Madras High Court gave, as noted in an earlier chapter, at pp. 4 and 6 of the Annual Civil Report of 1922 the number of suits undecided at the close of the year classified according to the years of institution. This return is very valuable, and should be prepared and published everywhere.

25. This concludes the returns which should in our opinion be prepared and published annually by the High Courts to give the necessary supplementary information required in India. There remain the returns which are required by superior courts as a check on the working of the courts below them.

In all provinces periodical statements are submitted quarterly or more frequently, by presiding officers of subordinate courts to the district judges. Some of these are submitted to the High Courts or Judicial Commissioners. Information as to the district judges' work is similarly submitted to the superior courts. Annual reports are also submitted by district judges. It is from these statements which reproduce the entries in the registers that the necessary information is obtained.

In most places witnesses have objected to the use of returns. They say that the courts are judged by returns to the exclusion of other factors, and that the work is considered good or bad according to the number of cases the courts dispose of, irrespective of the manner in which they dispose of them. This, they suggest, is the reason why difficult work is pushed into the back ground and easy work decided at once, too often perfunctorily and carelessly. There is some force in this objection, but it does not dispose of the matter. Returns are valuable. Superior courts must know the exact figures. They should, however, read them intelligently and in the light of their knowledge of the work of the individual judges derived from actual observation.

26. The mere fact that a suit has been pending for a considerable period does not in itself convey much to a supervising officer. Before he can form an opinion, he has to know why it has been pending, and the best method by which he can obtain this information is by reading an abstract of the order sheet in all suits which have been pending for more than a certain period. It is only in very few provinces that abstracts of the order sheets are sent to the supervising officers even in respect of suits that have been pending more than a year. In other provinces short explanations of delay are submitted, which sometimes provide useful information and sometimes fail to provide it, and in many provinces only bare figures are submitted.

We suggest that, wherever it be possible, an abstract of the order sheet should be submitted to the district judge at least in respect of original suits and execution proceedings which have been pending for over a year, and that after he has commented upon it, the abstract should be submitted to the High Court. It will undoubtedly be difficult to obtain this result in provinces, where the number of suits pending over a year run to thousands, but there should be no difficulty in the provinces in which they are only counted in hundreds.

The practice in the Punjab is to submit to the district judges explanations in only a limited number of the oldest cases. This practice has little to commend it. It may well be that in all such cases the causes of delay are not instructive. They may be beyond the control of the presiding offices in every instance, and the explanations will then necessarily afford no information as to his methods. We consider that all cases which are pending over a certain period require explanation and as already stated would fix that period at a year.

27. In most provinces presiding officers are required to record the time at which they come to court and the time at which they leave, and in certain provinces these time sheets are submitted to the district judge and in some instances forwarded to the High Court.

We think that the time, at which a judicial officer takes his seat on the Bench for disposal of business in open court, should be recorded by him each day. We think this necessary in the interest of parties and witnesses, to operate as a check against inconvenience, whether caused by the judge's late arrival on the court premises, or his remaining in chambers engaged in administrative work, while the parties and witnesses are kept waiting. We should leave to the individual High Courts the decision of the question whether any further information is required. But we emphasize the necessity of punctual attendance.

28. In some provinces presiding officers submit returns as to the number of suits and appeals which have not been decided within a month of the termination of arguments. Such returns should be supplied all over India, and should form part of the periodical returns.

Inspections.

29. Rules are laid down everywhere for inspection of subordinate courts both by the presiding officers and by the district judges. Judges of the High Courts and Judicial Commissioners further inspect these courts.

Whatever be the extent of improvement in the disposal of the work which will result from more effective training and better selection of officers, there will always be the need for inspection of courts. It cannot be said that as years have advanced, the need for inspection has become less. In all provinces the importance of inspection is recognised by the rules, and district judges are directed to inspect personally the work of the courts under them. But in many parts inspections have grown fewer and fewer.

We have found that in no province do district judges actually inspect as often as the rules require. The reason why they are unable to comply with their instructions on this point is because the state of their work does not give them sufficient leisure for the purpose. In provinces where the work is comparatively light, inspections are done reasonably well, but where the work has increased beyond a certain point, inspection by the district judge has tended to become perfunctory. In Bengal the district judge's duties have increased to such an extent that he cannot find time to get round his courts, or even to get to know his officers personally. There are district judgeships in which there are twenty courts or more. It takes on an average at least a day to make anything like a useful inspection of one court. Such an inspection may take as long as three days. A certain time must be spent in travelling. It may fairly be estimated that in a district judgeship with twenty courts the district judge will require at least a month to get round them, and even then he will not be able to inspect them thoroughly.

Unless the present law is abrogated, the district judge must be maintained as the administrative officer. It appears to us useless to suggest an alternative. If he is retained as the administrative officer, he must be responsible for the inspection of the courts subordinate to him, and it must be arranged, that he should have time for the purpose, without retarding the judicial work for which he is responsible.

30. Much may be done to effect these objects, by redistribution of duties, but in addition the rules for inspection should be remodelled to separate the inspection of judicial work proper from the inspection of office work. The district judge's real task is to discover the manner in which presiding officers conduct their case work. The quality of judicial work can hardly be judged sufficiently at the time of inspection, but it is for inspecting officer to see whether the presiding officer is an efficient organizer and supervisor. He should note the state of the file, the method in which the dates are fixed, how the day's duties are divided, how pleadings are examined, how documents are admitted into evidence

and returned when rejected, how issues are framed, whether adjournments are granted or refused for sufficient reasons, and other points which make for efficiency. He can best do this by taking a large number of suits and cases, both contested and uncontested, at random and going through the order sheets and also by examining the cause lists and noting on the disposals. He should also carefully examine the work in execution. It will ordinarily take at least a day to ascertain these points.

But in addition it is necessary to examine a large number of other points. The accounts should be closely checked. Records should be gone through to see whether the rules as to preparation, custody, and weeding are properly complied with, the work in the copying department has to be examined, the work of the subordinate officials has to be scrutinised, the important question of service of processes requires attention. But inspection in regard to these points can as well be conducted by a trained inspector as by the district judge. They take up most of the time of the inspecting judge at present. In Bengal the High Court directs the judge to go into one hundred points at the time of his inspection of the courts. Out of these points only fifteen require examination by the district judge himself and eighty-five could be done as well by a trained inspector.

The first suggestion made here is that trained inspectors should be appointed for the examination of the office work, whose reports should be submitted through the district judge to the High Court. The selection of inspectors must necessarily be left to local authorities, but we would indicate that in our opinion it is essential that such inspectors should be selected from those who have had first hand knowledge of judicial work.

31. The next suggestion that we make is that, in order to afford the judge an opportunity of inspecting the judicial work of the courts below him in places where at present he has not sufficient time to inspect every court once a year, it is desirable to appoint peripatetic judges to relieve district judges of all other duties for a month or more, in order to enable them to perform their inspections.

32. Very much is gained if the inspections of district judges are supplemented by inspections by judges of the High Courts and Judicial Commissioners. In provinces, in which the work of High Courts and Judicial Commissioners permits such inspections to be made, the result has been uniformly helpful. Points are discovered which have escaped the district judges, and further, very much is gained by the High Court Judges and Judicial Commissioners meeting the presiding officers personally and being able to discuss their difficulties. It is not only in respect of the presiding officers that these inspections are valuable. Wherever they are made, the judges of the High Courts and Judicial Commissioners obtain an opportunity of getting into touch with the members of the local Bars and of being able to improve the working conditions as a result.

With the accumulation of work in the principal High Courts it has become increasingly difficult for the High Court Judges to make such inspections. There is barely any time for the administrative work to be done in the High Court itself, and in the absence of increase of strength it can hardly be expected that inspections will be more numerous in future than they have been in the past.

Certain High Courts have been able to meet this difficulty. In the Punjab assistance was for some years given by the appointment of an additional Judge for six months, who remained engaged in judicial duties to enable the Judge in charge of the administrative duties to tour and inspect the subordinate courts. The result was a very marked improvement in the judicial work throughout the province. Unless some such assistance can be given, it is difficult to see how inspections can be made.

33. It is from inspections and the individual contact between the High Courts, district judges and the presiding officers of the subordinate courts that the best results are obtained. The complaint so frequently voiced that the work of the presiding officers of subordinate courts is appraised by a mechanical examination of the results of decided cases is mainly based on the absence of personal contact between these presiding officers and their superiors. Inspection, which is the most important part of supervision, should be constructive. The inspecting officer should aim at discovering the difficulties of the officer whose work he is inspecting, and helping him to meet them. Where faults are discovered due to idleness or perversity, the officer responsible should be dealt with suitably, but in our opinion most of the faults in the working of subordinate courts are due not to idleness or perversity, but to want of guidance. That guidance can best be given personally. It is difficult to give it effectively by written orders.

It is due to the absence of the personal touch that the graver defects have come into being. The rules and circular orders are good. The flaw has been that they are not observed, and that supervision has not been sufficiently effective to compel observance. High Court rules lay down in the clearest language the necessity of never fixing more work for one day than can be done in the day. Nevertheless cause lists are overloaded. All High Courts impress upon the courts subordinate to them the provisions of the Code of Civil Procedure to the effect that when once the hearing commences the evidence should be heard from day to day. Yet in many provinces the hearing of evidence proceeds too frequently piece-meal at intervals of as much as a month.

We have come across some instances which show that under the present system, although returns are called for, inspections are made and checks are supposed to exist, the higher authorities remain occasionally in absolute ignorance of the state of the work in a particular judgeship. In one case we were told that at one time a judge had heard arguments in some two hundred cases and had not delivered judgment in one of them. In another

instance a judge had gone on leave. At his departure there were seventy-seven cases awaiting decision in which arguments had been heard. These are the two worst instances. But they are sufficient to show how very necessary it is that the superior courts should exercise real supervision.

34. The necessity for effective administrative control is not likely to be appreciated by those who are familiar only with conditions in Great Britain. In courts in Great Britain there is not the same need for administrative control or supervision, and the extent of administrative control is not great. There is no regular machinery for supervision. The judicial work there is in the hands of Judges who have wide experience of the duties required before they arrive on the Bench. The arrangements for bringing actions and other matters before the courts are in the hands of a well paid staff who can be left to perform their duties without guidance. In India the conditions are very different. Presiding officers of subordinate courts are young when they assume their duties. The office staffs are not of the same calibre as the staff in England.

We have been impressed by the fact that in all provinces where the work is heavy, insufficient time is available for the performance of administrative duties, especially in the High Courts. Almost everywhere the administrative duties of the High Courts are performed out of court hours, and extra time is seldom allowed for their performance. Whether these duties be retained by the Chief Justice, or handed over to a Judge in the English Department, or divided up amongst other Judges, they are done for the most part in the mornings or evenings, at times when the Judge is not engaged in actual judicial work, and every minute devoted to the performance of these duties has usually to be taken out of the Judge's spare time. When the administrative work is comparatively light, it is possible for the Judge to devote sufficient leisure to their performance without undue strain, but when these administrative duties are really heavy, as they are in the major provinces, no Judge can do justice both to his judicial and administrative duties. Where the arrears are heavy—the Court has to choose between falling even further into arrears with judicial work proper or neglecting administration.

Registrars of High Courts.

35. The duties of registrars of High Courts vary considerably. We are not concerned here with the duties of registrars in respect of suits tried by the High Courts in the exercise of their original civil jurisdiction. We are here concerned with their duties in respect of the remaining work done by the High Courts. In Patna, where the registrar is a senior district judge with wide judicial and administrative experience—it is only there that such an officer is appointed to the post—he has the most extensive powers. He receives appeals under clause 10 of the Letters Patent; receives

applications for Probate or Letters of Administration or for revocation of the same and issues notices thereon; receives appeals from the decrees or orders of subordinate Civil Courts and determines whether they shall be admitted and notice issued at once to the other side, or be posted for hearing under Order XLI, rule 11 or otherwise laid before the court for orders. He disposes of all matters relating to court-fees or to the service of notices or other processes. He receives and disposes of applications under Order XXII, rule 2, 3, 4 or 10 and amends the record, if necessary, except in cases under appeal to His Majesty in Council. He appoints or discharges next friends or guardians *ad litem* of minors or persons of unsound mind, except in cases under appeal to His Majesty in Council. Some of these duties are of a quasi-judicial nature. He has many other duties. In Allahabad the registrar's duties are much more restricted and he has no duties of quasi-judicial nature. These two High Courts may be taken as representing the two extremes.

In our opinion the registrar should dispose of quasi-judicial work such as formal applications for substitution of parties, appointments of guardians *ad litem*, and other common form incidental work.

His administrative duties involve a considerable amount of supervision over the work of the subordinate courts. The registrar reports in the beginning on all such matters as transfers of judicial officers and applications for leave of judicial officers and deals with correspondence, disposing of less important letters himself and forwarding other letters for orders to the judges. It is desirable that all High Courts should consider the question of extending the duties of registrars so as to relieve the High Court Judges of a portion of their administrative work, when possible. Having regard to the judicial and administrative duties of the registrars in the High Court no person should be appointed to the post of registrar unless he has had considerable judicial experience as a civil judge. He is not to be regarded as a secretary only.

Rule Committees.

36. When the present Code of Civil Procedure, Act V of 1908, was enacted, an important change was made. The old Codes, the last of which was the Code of 1882, laid down the procedure for all courts and no rule of procedure could be altered except by legislative enactment. Under the new Code, fundamental principles are stated in the sections which compose the body of the Code. The main rules of practice are contained in the Orders. Any alteration in the main body of the Code can be made only by the legislature, but alterations in the Orders can be made by the High Courts under certain restrictions. The practice now adopted in India is similar to the practice in England. The reasons for the alteration were given by Sir Erle Richards, Law Member, in his speech introducing the new Bill on the 6th September 1907 in the following words:—

"We cannot bring in bills year by year to remedy defects as they occur. If we were to do so our Statute Book would be full to confusion with small enactments. But in the case of amending Acts of wider scope the process of legislation must be slow. This very bill has been under the consideration of the Government of India for fourteen years and the present Code was for a similar time on the anvil. The result follows that improvement can only be made at long intervals and that imperfections in procedure may remain for years unremedied. In this way the action of our courts is hampered and injustice is perpetrated. There is, My Lord, a further disadvantage in the absence of any elasticity in such a law as this. The Code of Civil Procedure extends practically to the whole of British India, indeed I might go further, for it has been adopted or is followed in many of the Native States. When one considers how vast the area is to which it applies; how diverse are the conditions and the wants of the inhabitants of that area one realises how impossible it is to frame a fixed Code suitable alike to every part of this country. The result is that some of the machinery of the Code is more elaborate than is necessary for certain areas.....

"My Lord, if some power were given to alter minor provisions without resort to the legislature, if there were means to enact that the more elaborate details of procedure should not apply in special cases or in special areas, these two objections will be avoided. The Committee are strongly of opinion that this should be done; they believe that in every respect it is expedient to introduce more elasticity into our procedure.

"A power to vary these provisions or to make new provisions is then given to the High Courts but it is given subject to certain checks. In the first place, the High Courts can only act with the sanction of the Local Government, or in the case of the High Court of Calcutta, of the Government of India. That, My Lord, will ensure that every change shall be fully considered before it is made, and it will ensure that such uniformity is maintained among the various Provinces as may be thought desirable. The Committee have strengthened this by their recommendation that no proposal for change should be accepted before it has been communicated to the Government and to the other High Courts, though this is not a matter which requires to be provided for in the Act. Further than that, it is proposed that High Courts shall only act after they have consulted Rule Committees—standing bodies to be erected by each High Court on which the various branches of the legal profession are to have representatives. The Government of India attach much importance to these committees. They think that it will be most valuable to have the opinion of practitioners before changes are made....."

37. The provisions relating to the exercise of the new authority are contained in Part X of the Act, sections 121 to 131. Under section 123 a committee called the Rule Committee was constituted in Calcutta, Madras, Bombay, Allahabad, Lahore and Rangoon,

It is the duty of this committee to consider alterations necessary in the procedure, and when they have done so to make a report under section 124 on those suggestions to the High Court concerned. The rule making power is with the High Courts. It has, however, to be noted that the legislature can also alter the rules of practice, although it would appear that it is open to the High Courts either to accept or not to accept the alterations made by the legislature.

These Rule Committees have all come into being, but so far they have not materially altered the procedure laid down in the Code. At the time that the Bill was introduced it was suggested that the High Courts might not be inclined to make much use of the authority given to them under the new provisions. This point was discussed by the Law Member in the same speech. His words were as follows:—

"It has sometimes been objected by those with whom I have discussed this proposal that High Courts will be inert and will not care to exercise the power to amend the rules. My first answer is that, even if that be so, no harm will be done, for the position will be exactly as it is now...My second answer is that I decline to accept the anticipation that the High Courts will be inert. My experience is that the High Courts of India (and I include in this expression the Chief Courts) and the Judges who compose those Courts are foremost in their desire to improve the administration of justice. If this bill be passed into law they will have the opportunity of taking an active part in the improvement of procedure, and I, at least, am confident that they will take advantage of that opportunity in the best interests of the public.....

"Since the Code of 1882 was passed, there has been a manifest improvement in the courts which have to administer it and from the information at my command I am confident that the courts are improving year by year. The courts can safely be trusted to give effect to principles, and it is in the interests of justice that they should apply principles rather than limit their judgments to the question whether any principal case before them is within the four corners of a section."

38. Over sixteen years have now elapsed since the provisions of the new Code came into force. The anticipations of Sir Erle Richards have not so far been realised. The alterations made by the High Courts in the various provinces have been very few, and the rules of procedure have not received the attention they should have received. The reason for inaction of the various High Courts appears to have been that they have little or no time to attend to these matters. Alterations in rules of procedure entail anxious consideration, much preparation, careful examination and lengthy discussion. And the time has been wanting.

Sir Erle Richards laid down in clear terms the necessity of the situation in respect of the work of Rule Committees. We wish to emphasise the point. If these Committees do not function as the legislature expects them to function, the work of the courts will not only not improve, but will deteriorate. It is impossible in

practice for the legislature to devote the attention required to alterations in procedure as the need comes into being. Even if it had the necessary time at its disposal for these duties, it would be inadvisable for the legislature to undertake them, as local conditions vary in different provinces and an alteration that is desirable in one province may be undesirable in another. The rule making power of the High Courts must not be allowed to fall into abeyance. Whatever be the demands on the time of the Judges of the High Courts and other members of the Rule Committees room must be made for these duties.

CHAPTER 35.

Transfers of Immovable Property.

REGISTERED INSTRUMENTS—PART PERFORMANCE.

1. The major portion of the time spent in the actual trial of suits and proceedings before civil courts is that occupied in examining witnesses and recording their evidence. A large volume of testimony is frequently adduced to prove a variety of pleas upon matters which ought not to depend on oral evidence, but on which oral evidence cannot, as the law stands, be excluded, notwithstanding the provisions of the Registration, Evidence, and Transfer of Property Acts and other statutes. The provisions of these Acts were framed to make title to land certain and secure, and to compel writing and registration at a comparatively small cost in order to avoid the expense and uncertainty of litigation. It is for many purposes an accepted principle that documentary proof alone will enable the courts to decide rightly, and that people may justly be required so to conduct their transactions that their rights will not depend upon oral evidence. Only too frequently such evidence can easily be purchased and produced, especially by the influential and the rich.

2. Sir Richard Garth, more than forty years ago, when advocating the desirability of a complete contemporaneous record of all transactions relating to land, indicated the evil to be remedied in the following trenchant language. "I suppose it is almost undeniable that to compel such transactions to be reduced to writing and have them publicly registered is about the most effectual means that any Government can provide of preventing fraud in such matters. I suppose it is also undeniable that there is as much fraud and perjury committed in this country with reference to such transactions as there is in any other country in the world. It is really almost impossible for any one experienced in the proceedings of courts of justice in India to imagine the amount of wickedness of that particular kind which is habitually practised there. It is literally true that there is hardly any case of importance relating to land in which one or other of the parties does not himself attempt or charge his opponent with attempting some fraud or perjury; and it is almost a common form in most suits for each of the parties to allege that some at least of the documents which are filed by his adversary are forgeries. Now this is nothing short of a monstrous national evil. It is frequently subversive of justice. It gives rise to the grossest immorality. The courts may check it in some degree by prosecutions for perjury and the like, but the system is so deeply rooted that it is to the legislature and legislature only that the nation must look to repress the mischief in any material degree. And the legislatures have the means, if they would only exercise it, of greatly decreasing the mischief. That means consists in requiring all contracts and transactions relating to land

to be in writing and registered. A very large proportion of so-called parol arrangements are made for the purpose of defeating creditors or with some other fraudulent object; they are generally brought forward in courts of justice to defeat the title of a *bonâ fide* purchaser for value and in the large majority of cases they are disbelieved by the courts and found to be fraudulent. And the present law too works injustice in this way. So many of these oral transactions which are set up in courts of justice are found to be fraudulent that judges are sometimes induced to mistrust and often reject as fraudulent the few that are genuine." These observations were quoted by Sir Whitley Stokes when presenting the report of the Select Committee on the bill which became the Transfer of Property Act [*cf.* Proceedings of Council of the Governor General 1882, Vol. XXI, page 58.] The learned Chief Justice was of opinion for these weighty reasons that all contracts and transactions relating to land should be in writing and registered; such a provision would prevent a vast amount of fraud and litigation and would be a great blessing to the whole community and especially to those who most need security and protection, namely the poorest and most ignorant.

3. The terms in which Sir Richard Garth inveighed against the evil of permitting proof by oral testimony of arrangements relating to land are as applicable to the proceedings in courts of justice to-day as they were forty years ago, and at present the provisions of the law as to registered instruments are sufficiently well understood upon the whole as to make them operate without a degree of hardship disproportionate to the gain. We consider, however, that in some respects they do not go far enough. Provision is necessary to stiffen the law requiring the creation of title to immovable property to be effected only by registered instruments and to ensure that the points in issue arising for decision in certain other cases do not depend on oral evidence. Otherwise unnecessary evil must continue. Questions, the determination of which in the absence of registered documents is constantly causing delay and uncertainty in the disposal of suits, are as follows:—Whether a Hindu family is divided or joint: whether there has been a release by a member of a joint Hindu family or a surrender by a female heir, or a family settlement, or a grant for maintenance; whether there is a contractual partnership under section 239 of the Indian Contract Act; whether a registered document embodies a *benami* or sham transaction. These have to be decided in many cases by weighing conflicting oral testimony, which has to be heard and recorded by the judge. We believe that it is possible to effect improvement in some of these cases by an extension of the requirements of the Registration law. The principle to be insisted on is that the rights of parties shall be determined upon documentary evidence and, so far as may be, upon this alone in all cases where it is not unreasonable to require the parties to see that these transactions are committed to writing or are effected by a written instrument.

4. We are aware that the proposals which we make for this purpose are of a far reaching character, although they raise, as we

think, no new principle. We would point out, however, that if they can be carried into effect the advantage to be gained by them is very great. We have tried to make them specific and to state them concisely; but we are well aware that no one of them is simple and that it will be necessary to have a fuller consideration of each of them in the light of objections that may be taken by High Courts, by the profession, by public associations and by the public at large. We can only say that after giving to each our best consideration, we believe, that no one of them is really impracticable.

To avoid misunderstanding, however, it is necessary to point out that to suggest the exact form of amendments in conveyancing statutes is a task, which involves a minute study of drafting and much special consideration of case law. We understand that a revision of the Transfer of Property Act is under consideration and that considerable amount of attention has already been devoted to this work. It is within our competence to call attention to the lines of reform which seem to us to be called for and on this basis we make our recommendation. The actual revision of the Transfer of Property Act, even in respect of the matter to which we call attention, should be done in the first instance by the specialist in his study: it will be sufficient if the suggestions of this Committee can be utilised to assist his labours.

5. There is, however, one very important legal doctrine which requires particular consideration in connection with any proposed extension of the requirements of the Registration law. It is the doctrine sometimes referred to as the "doctrine of part performance" although it may be doubted whether this phrase at all adequately describes the principle. The Judicial Committee of the Privy Council in the case of "Mohammad Musa *v.* Aghore Kumar Ganguli" [1914, I. L. R. 42, C. 801] affirmed the doctrine in question. Whatever room for dispute there may be as to the exact range of its application or the exact principle which underlies it, the doctrine itself is one which all the Indian Courts regard themselves, in the present state of the law, as bound to apply.

6. Section 54 of the Transfer of Property Act commences as follows:—

> "Sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised."
>
> "Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument."

Section 107 provides as follows:—

> "A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by registered instrument.
>
> "All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession:

" Provided that the local Government may, with the previous sanction of the Governor General in Council, from time to time, by notification in the local official Gazette, direct the lease of immovable property, other than lease from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession."

Again section 59 commences:—

" Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor, and attested by at least two witnesses.

" Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a ' registered instrument ' signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property."

By section 118 a transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

7. If in any case the purchaser or the lessee omits to comply with the requirement of a registered document, the question arises whether, notwithstanding the statutes, he has obtained any title. If the view taken be that as between the vendor and the purchaser and as between lessor and lessee an objection based upon non-compliance with the statutory requirement is one which cannot honestly be taken and which should not be given effect to, a question arises whether the requirement of registration is one which is supported by any sufficient sanction and whether people will not constantly fail to comply with the law because the law will constantly excuse. As between such a purchaser or lessee and a stranger taking from the vendor or lessor by registered instrument without notice, other considerations arise.

8. By the Indian Registration Act (Act XVI of 1908) the requirement of registration is imposed upon all documents affecting immovable property coming within certain very wide classes. These include instruments of gift and other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish any right, title or interest of the value of one hundred rupees and upwards to any immovable property. They include also leases of immovable property from year to year or for any term exceeding one year. " Lease " includes an agreement to lease but only if the document effects an actual present demise and operates as such. By section 49 no document required by section 17 to be registered shall:—

(*a*) affect any immovable property comprised therein, or

(*b*) confer any power to adopt, or

(*c*) be received as evidence of any transaction affecting such property unless it has been registered.

9. So far as mere agreements are concerned, the law of India has never followed the English Statute of Frauds. Thus a contract for sale of immovable property need not be in writing at all but it is provided by section 54 of the Transfer of Property Act that a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property. In the same way a contract to grant a lease need not be in writing and specific performance may be ordered of an oral agreement.

10. By section 27 of the Specific Relief Act (Act I of 1887) specific performance may *primâ facie* be enforced against a party thereto or any person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. As explained in the illustrations to the section, if A contracts to sell land to B and B takes possession of the land and thereafter A sells to C the possession of B is sufficient to affect C with notice of his interest and he may enforce specific performance of the contract against C. It is important here to notice that the Limitation Act, 1908, by Article 113, prescribes as the period within which suits for specific performance must be brought three years from the date fixed for the performance, or if no such date is fixed from the date, when the plaintiff has notice that performance is refused.

11. For the present purpose the above provisions of the law may suffice as an indication of the conditions of the problem. It is not our intention to embark upon a critical analysis of the case law. Prior to the decision of the Privy Council in 1914 in the case above referred to, one view very widely taken by the courts may be illustrated from the judgment of Sir Arnold White in the case of "Kurri Veerareddi *v.* Kurri Bapireddi" (I. L. R. 29, Madras, 336). "We have to choose between laying down a rule which, in every case in which a purchaser is in possession under an oral or unregistered agreement and the vendor seeks to eject, may well involve an inquiry as to whether the circumstances of the particular case are such that the defendant is entitled by way of equitable defence to a decree for specific performance of the oral or unregistered agreement and the rule that in all cases the express words of the statute must prevail. I do not think we are precluded by authority from adopting the latter rule, which carries out what appears to have been the intention of the legislature and seems to me to be in accordance with public policy." Another view is that even in the absence of a registered instrument of conveyance the vendor or a purchaser from the vendor against whom the defendant could maintain a suit for specific performance of an oral or unregistered written agreement for sale is disentitled from recovering possession from the defendant, provided that the court deciding the question of ejectment has jurisdiction to decree specific performance and the circumstances are such as to entitle the defendant to such a decree in the suit. This view is based upon the English case of

Walsh and Lonsdale [1882, 21 C. D. 9]. A third view would refuse to the vendor or to a purchaser taking from him with notice of the prior transaction any right to eject even though the time has elapsed within which a suit for specific performance is allowed by the Limitation Act and even in cases in which for other reasons a decree for specific performance could not be granted. The basis for this last view would appear to be found in certain passages from Professor Bell's " Principles of the Law of Scotland " cited by Lord Selborne in the course of his decision in " Maddison *v.* Alderson." The purchaser taking without a registered instrument is regarded as one whose title is inchoate or incomplete. The actings of the parties from the time such purchaser was let into possession are regarded as *rei interventus* raising a personal exception which precludes the vendor from maintaining that he has any power of resiling from an incomplete engagement.

12. It seems somewhat idle to say of certain transfers that they can be made only by a registered instrument and of others that they may be made either by registered instrument or by delivery of the property, (*c.f.* section 54 of the Transfer of Property Act), if nevertheless in the former case delivery of the property in pursuance of an oral agreement is to amount to a valid transfer apart altogether from any right to specific performance. This, however, would seem to be the present position of the law as regards the interpretation of the Transfer of Property Act. It may best perhaps be shown by the following passage which occurs in the opinion of the Full Bench of the Madras High Court in the case of " Vizagapatam Sugar Company *v.* T. Muthuramareddi " (45 M. L. J., 528), " What the statute enacts is that a document of title to land—a conveyance in short—can only acquire validity, can only in fact be provable, on registration. So far from forbidding unregistered contracts for the sale of land, it expressly recognises their existence, denying to them only the creation of an interest in or charge upon the land itself—and therefore leaving their contractual effect as between the parties to the contract unimpaired." In applying the doctrine of part performance special difficulty would seem to be created in cases where the only evidence of the transaction is a document of conveyance required by section 17 of the Registration Act to be registered but which has not in fact been registered. Section 49 of the Registration Act makes it particularly difficult to hold that such a document can be received as evidence, treated as a good contract though not as a conveyance, and specifically enforced accordingly. Although leases and gifts stand in some respect on a special footing, sales, leases, mortgages and exchanges are all affected by these difficulties.

13. In some parts of India the requirement of registration is becoming to a large extent ineffective if not nugatory so far as regards the object of excluding oral evidence and confining the courts to certain documentary evidence in deciding upon questions of title. This gives rise to special difficulties in cases where the time limited for bringing a suit for specific performance has long

ago elapsed. A person in possession who may be a squatter, a tenant or anyone else can set up that years ago he was let into possession as purchaser, mortgagee, lessee for years or otherwise and can compel the registered owner of the property to contest by oral evidence the truth of these assertions. On the question of notice a stranger purchasing from the registered owner may be put in a very difficult position in like manner. Such cases, we are informed, are occurring with an increasing frequency particularly in Burma and in Madras. So long as they are at all common, it cannot be pretended that the requirement of registration is fulfilling its intended purpose.

14. It appears to us that the working out of the principles laid down in the case of Mohammad Musa above cited is likely to be of more and more difficulty in the near future. The principles cannot yet be said to have been defined with any exactitude or to be applied with any uniformity. Our statute book says nothing about part performance. In view of the absence in Indian law of any provisions as to contracts really analogous to those of the Statute of Frauds, English cases on " part performance " yield a dubious and insecure analogy even as regards " agreements to lease." The principles derived from Scots law as to *locus penitentiae* and the doctrine of *rei interventus* are, to say the least, not readily adaptable to the language of the Registration Act or the Transfer of Property Act. It is probably right to say that no branch of English Law creates more difficulty in our lower courts than the principles of equity which were elaborated in England with reference to very different circumstances and very different laws. We are not convinced that the doctrines referred to under the name of " part performance " are logical in themselves or when taken together with the language of the Registration Act; but however this may be we think that a question has now arisen which the legislature should determine.

15. If the intention of the legislature in introducing compulsory registration was to minimise the chances of litigation, to reduce the opportunities for perjury in connection with transactions in immovable property and to render titles certain by enabling people to act according to the state of the title as disclosed by the register, it may well be held that the introduction of English equitable principles should not be permitted in derogation of the statutory requirements. Even as regards the Statute of Frauds the advisibility of equitable exceptions has been doubted by a high authority. The following passage from Story's " Equity Jurisprudence " was quoted by Sir Arnold White in the case already referred to [29 M. 336].

> " It must be admitted that the exceptions thus allowed do greatly trench upon the policy and objects of the Statute of Frauds, and, perhaps, there might have been as much wisdom originally in leaving the statute to its full operation, without any attempt to create exceptions, even in cases where the statute would enable the party to protect

himself from a performance of his contract through a meditated fraud. For, even admitting that such cases might occur, they would become more and more rare as the statute became better understood; and a partial evil ought not to be permitted to control a general convenience. And it is indeed far from being certain that these very exceptions do not assist parties in fraudulent contrivances, and increase the temptations to perjury, quite as often as they do assist them in the promotion of good faith and the furtherance of justice. These exceptions have also led to great embarrassments in the actual administration of equity; and although in some cases one may clearly see that no great mischief can occur from enforcing them, yet, in others, difficulties may be stated in their practical application which compel us to pause and question their original propriety."

16. The effect of non-registration upon a document is dealt with—none too clearly—by the Indian Registration Act. The effect of non-compliance with the provisions of the Transfer of Property Act is a connected but a somewhat different question which the legislature has not grappled with. The contractual effect of an instrument purporting to be a conveyance but void, as such, for want of registration and of the actings of parties in connection therewith should, in our opinion, be defined by statute and should be defined so as to give full effect to the considerations of public policy on which the requirement of registration is based. It has been shown that the requirement is already applied to transfers of immovable property of several very different kinds. It does not follow that in such a matter they can all be dealt with on exactly the same footing. As soon as it is known to be well settled that the strict letter of the law will be applied, cases of individual hardship will cease to occur, and full effect will be given to the considerations of public policy on which the enactment in question was based.

It is manifestly impossible to refuse to entertain a suit for specific performance of a contract, *e.g.*, for the sale of land so long as it is brought within a proper period of limitation and is otherwise competent. Whether a claim to specific performance should be entertained when it is made purely by way of equitable defence may seem a comparatively small matter. We believe, however, that in practice the law would work much better if persons claiming land under an unregistered transfer are required to bring an independent suit for specific performance unless of course twelve years possession had given them a title by prescription. So far as future transfers or agreements to transfer are concerned, we think that this right would be a sufficient recognition of the equities arising from the conduct of the parties. For this purpose it should be enacted that an unregistered instrument of conveyance, void as a conveyance for want of registration, might be deemed to be, of itself, a contract to convey, except in the case of instruments of gift and with the possible exception of agreements to lease.

CHAPTER 36.

Extension of the Requirement of Registration.

Partitions and other Transfers.

1. We deal first with partitions under the Hindu Law of joint family property. Such partition may be effected without any instrument in writing: Numerous circumstances have to be taken into consideration in arriving at a conclusion as to whether a partition has actually taken place, *e.g.*, separate mess, dwelling, or worship; separate enjoyment of the property; separate income and expenditure; business transactions with each other and the like. All these circumstances are merely evidence and not conclusive evidence of the fact of partition and they have to be proved by witnesses and determined by weighing conflicting oral testimony. If, however, there is a deed, it is an instrument of partition within the meaning of section 2, clause 15, of the Indian Stamp Act and has therefore to be stamped under article 45 of the first schedule of that Act. The stamp duty that is payable upon an instrument of partition is the same as on a bond for the amount of the value of the separated share or shares of the property. Such an instrument, if it affects property for a value exceeding Rs. 100 falls within section 17 of the Registration Act and must be registered. Under that section, however, any decree or order of a court, any award or any instrument of partition made by a Revenue Officer does not require registration.

2. It is now a matter of no little difficulty in each case to determine whether a document is an instrument of partition or not, whether it effects a change of status, whether it is merely an acknowledgment of a partition which is an accomplished fact or does itself effect the partition. Difference of opinion is always likely to arise in determining whether the intention of the parties is that the document should be the sole evidence of the partition, whether a deed is part of the partition transaction or contains merely an incidental recital of a previously completed transaction. These differences of opinion are due to the existing law which requires no deed to evidence a transaction of partition. It may be effected in the presence of arbitrators or by the parties dividing the property themselves by metes and bounds without any document or merely by the preparation of a list setting out the property falling at the division to each shareholder. Moreover, the conversion of the joint tenancy of an undivided Mitakshara family into a tenancy in common may be effected without any physical separation of the particular items of property. An unequivocal declaration of the intention on the part of any one member to sever himself from the joint family effects a complete severance or partition in interest and status, though it is but unilateral and is not followed by actual division. In every such case the question will be whether the intention to become divided in status was clearly and unequivocally

expressed. Such intention may be evidenced in different ways, *e.g.*, by explicit declaration or by conduct. If it rests on an inference to be derived from conduct, it will be for the court to decide on the facts of each particular case whether the conduct is sufficiently explicit and unequivocal to warrant the inference. This again means the weighing of oral testimony.

3. In order to place transactions relating to partition as far as possible beyond doubt and not dependent for proof on oral evidence, it is advisable to enact that in certain cases at least partitions should be effected only by an instrument duly registered. The question however will have to be considered whether a transaction which hitherto has required no document and which accordingly can be proved without payment of any duty under the Stamp Act should be brought within the provisions of the Stamp Law by the requirement of writing and registration. To avoid this the stamp duty to be levied may be fixed on such a basis as not to work hardship upon the parties effecting the partition.

4. It has been urged that to prescribe writing and registration to evidence partition of properties of small value situated far from registration offices in villages where but few people are literate, might work considerable inconvenience to persons who in the ordinary course of the enjoyment of their property have according to the Hindu Law to divide and live separate. But this is an argument common to all rules requiring writing and registration. The Transfer of Property Act and the Registration Act have been in force for more than forty years and parties have come to realise that transactions of a particular kind have to be effected only in this special manner. If once it be enacted that partitions should also be effected by registered instruments and if it be also provided that after a particular fixed date, any partition not complying with this formality should be invalid, we do not think that undue inconvenience need be apprehended.

5. In all the Provinces many of the witnesses favoured the suggestion that partitions of immovable property belonging to joint Hindu families should be effected only by written instruments and that such instruments should be registered.

6. It is necessary to be clear as to whether in all cases of separation of interest causing a change of status there must be a written instrument notwithstanding that no actual division of the property is made. As already pointed out, the unilateral declaration of a single member of a Hindu family may effect change in status. Our recommendation is that even such declarations of intention should be evidenced by a written instrument duly registered if they are to take effect as partitions in any sense. The issue of a plaint claiming partition may be exempted just as the decrees of courts are at present exempted by the Registration Act, but we consider on the whole that it would be better not to permit this exemption. The main hardship arises under the Mitakshara Law. A very frequent form of the difficulty is that a daughter or widow is liable to be deprived of an inheritance by means of a false claim of succession

by survivorship made by agnatic relations from whom the father or husband had in fact separated but without preserving any incontestable record of the separation. So too in execution the judgment-debtor's right very frequently depends on the facts as regards survivorship.

7. We have to consider whether the requirement of a registered instrument should be made to apply to cases in which a joint family is not possessed of land of the value of Rs. 1,000 but is possessed of money, book-debts or other actionable claims, of a substantial value. In certain classes of the community there may be trading families of considerable wealth but owning very little land. We think, however, that there would be much difficulty in ascertaining in many cases the value of book-debts and in determining whether or not they belong to the joint family or are the separate acquisition of an individual member or members. We desire in this matter to introduce the requirement of registration as cautiously as possible since experience of its actual working would be of great assistance in deciding as to the practicability of any further extension. Opinions will differ as to the particular limit of value which should be taken as exempting property from the requirements which we propose. We do not think that the requirements of different provinces really necessitate a different figure being prescribed for each. If Rs. 1,000 be taken as the minimum value of immovable property which should attract the operation of the proposed rule we consider that this will work well throughout India. In order to secure certainty as regards the value of immovable property we think that Local Governments should be empowered to prescribe rules for valuation according to the amount of the assessment to revenue or otherwise as they think fit.

8. By certain special and local acts revenue paying estates can only be partitioned by means of certain special formalities and in a particular manner. The rule which we suggest would not interfere with the validity of any such partitions.

9. Our proposal in these circumstances is as follows:—

That in the case of any joint Hindu family if the immovable property belonging to the joint family exceeds the value of Rs. 1,000—

(*a*) no separation of interest so as to make the members of the family or any of them cease to be undivided shall be effected otherwise than by a registered instrument whether any actual division of property be or be not made or agreed on in connection therewith,

(*b*) no partition of the whole or any part of the immovable property belonging to such family shall be valid unless the same be made by registered instrument,

(*c*) exception from these requirements shall be permitted in the case of any decree or order of court, and any instrument of partition made by a Revenue Officer.

Other forms of transfer.

10. The Transfer of Property Act requires a registered instrument when property is conveyed by sale, mortgage, exchange, gift or lease and an instrument in writing in the case of the transfer of an actionable claim. Section 17 of the Registration Act requires registration of instruments of gifts, and of other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish whether in present or future, any right, title or interest, whether vested or contingent, of the value of one-hundred rupees or upwards, to or in immovable property. There is, however. no law requiring any instrument in writing or any particular formalities with regard to surrenders by female heirs in favour of the presumptive reversioner,. releases by members of joint Hindu families in favour of other members, family settlements which alter the status of the co-parceners or the allotment of immovable property to a widow for her maintenance.

11. It is now settled law that if a widow surrenders her property to the presumptive reversioner she ceases to have any estate and the ultimate reversioner will be bound by her act. When there is no law that she should do this only by an instrument in writing registered, the fact of surrender can be proved like any other fact in issue or relevant fact by any of the modes allowed by the Evidence Act.

12. A co-parcener without any intention of giving up his share in the joint family property may be absent for a long time in a distant place carrying on trade or managing the estate of his wife or father-in-law; when he returns to claim his share in the family property he can be met by a plea that he has released his share in favour of the other members and he is entitled to no share. As the Hindu law contemplates union and not partition as the normal status of a family, lapse of time is never of itself a bar to the right to claim partition. Article 127 of the first schedule of the Limitation Act bars a suit by a person excluded from joint family property to enforce a right to share therein only if it be not instituted within twelve years of the time when the exclusion becomes known to the plaintiff. As then mere lapse of time is of no avail, the possession of one member being that of all, and as the proof of exclusion is highly difficult, a release by the plaintiff and a title in the defendant based upon a separate status is constantly put forward. Such release not being required by law to be in writing, the fact in issue has to be decided by weighing oral evidence.

13. When members of a joint family have differences and are for the sake of peace advised by mediators to continue to enjoy the family property as theretofore till a final partition is effected and each member is in possession of different portions of the joint property, after the lapse of a few years, the suit for partition is defended on the ground that there was a family settlement which effected a complete division and separation of status. And not infrequently the mediators themselves take sides and a protracted

trial follows with all the delay and expense which we have adverted to already.

14. Again, if a widow is in possession of property she may easily plead that it was allotted to her for her maintenance when it did not come into her possession in that manner; similarly the agnatic relations of her husband may resile from a genuine maintenance arrangement and trespass on the property allotted to her. In either case the absence of documentary evidence impedes the course of justice and contributes to the delay in judicial proceedings.

15. We have indicated the simplest examples of the cases falling in the category of surrenders, releases, family settlements and maintenance grants. These cases assume various shapes and the issues arise for decision not only in suits between the parties to the alleged transaction but also in others where the property affected by the transactions is in the hands of transferees for consideration. We do not propose to deal with all the diverse ways in which transactions of this kind may be placed before courts in the course of judicial trials. The Legislature has prescribed registered instruments for transactions relating to immovable property even of very small value in sections 59, 107, 118 and 123 of the Transfer of Property Act. We but desire to have an extension of the principle on which these provisions of the law are based to transactions relating to immovable property of the classes adverted to above. They are often of great value and importance and must be capable of being proved in courts by documentary evidence of a satisfactory nature.

16. It was pointed out in some provinces that till more registration offices were opened and villagers became accustomed to them, they ought not to be made to undergo the expense incidental to a long journey to a far-away registration office. But we may point out that with the increase in registration work more registrars' offices are bound to be opened and that we ought not to rest content with the prospect of registration becoming popular in the distant future and allow unchecked the evil which we have shown to exist. The requirement of registration puts the party to a certain degree of expense and trouble but security of title is well worth it to the party and of great importance to the State.

17. Our proposals are that all surrenders by Hindu female heirs as limited owners in favour of the presumptive reversioner, all releases made by a member or members of a joint Hindu family in favour of the other member or members, all family settlements whereby the rights of different members of the family are adjusted and all grants to Hindu widows for their maintenance, should be in writing registered if immovable property of the value of more than Rs. 100 is affected thereby.

CHAPTER 37.

Registration of Partnerships.

1. There can be no doubt that, if it be practicable to insist upon registration of contractual partnerships, a great deal of uncertainty in litigation might be saved, even if businesses belonging to Hindu joint families be excluded entirely from the requirements of registration. Questions concerning the existence and the terms of a partnership arise in cases where persons claiming to be partners sue for dissolution and accounts, or otherwise to enforce the partnership agreement. A just decision upon a variety of questions under sections 240 and 244 of the Contract Act would be much assisted, if terms upon which partnerships have been entered into were readily ascertainable. Even more troublesome, however, are cases in which a creditor of a firm claims to make a defendant responsible as being a partner in the firm. The procedure, whereby under Order 30 of the Code suits may be brought or defended in the firm's name, would work with much greater facility than is at present possible, and the provisions of Order 21, rule 50, would be more readily enforcible if partnerships were compulsorily registered.

2. We have had on this subject much valuable assistance from Mr. B. L. Mitter, Standing Counsel in Calcutta, who has made a special study of this question. The memorandum which he submitted to the Indian Industrial Commission 1916—18 states the position so shortly and admirably that we think it would be highly useful to repeat it here:—

> "Partnerships can be formed and dissolved in writing, as well as, verbally. Deeds of partnerships are, however, rare among Indian traders. These traders have partnership firms spread all over the country and, so long as business is carried on honestly, no difficulty is experienced by people dealing with them. Trouble commences when a partnership seeks to repudiate its just liability and a creditor is compelled to go to law."
>
> "These partnership firms are not always managed by the partners. Sometimes, the partners or one or more of them are found to be engaged in active management, but in very many instances they leave the management with *gomastas* or servants. In the latter cases the *gomastas* do all acts necessary for or usually done in carrying on the business of the partnership. A *gomasta* gets either a fixed pay or such pay *plus* a share of profits or a share of profits only in lieu of remuneration."
>
> "The capital invested in the partnership generally carries interest, but the rate of interest sometimes varies with the profits, and it frequently happens that a share of profits is paid in lieu of interest. The capital invested may be the money of the partners or of a creditor having no share in the partnership."

"The constitution of the partnership or the internal arrangements as to shares, capital, interest and management generally are unknown to the outside dealer. Such knowledge is unnecessary in normal conditions of honest trade. But it becomes a matter of paramount importance when he is confronted with a dishonest attempt to repudiate just liability and the dispute is to be settled in Court."

"It is well known that Indian traders of the class mentioned above do not attach much importance to the name of the firm and changes of name are of frequent occurrence. A firm name is no guide to its constitution. Very often a minor son's name is tacked on to that of the father or a grandfather long deceased. There is no method or system in a firm name from which any safe inference can be drawn."

"The difficulty which a stranger has to contend against may be illustrated by the defences usually set up in Courts of law."

"Suppose A, B, C, and D are partners of a firm, the first three only having furnished the capital and D contributing labour and skill as the working partner. D gets a fixed allowance and a small share of the profits as partner. P brings a suit against all the four partners for the balance of the price of goods sold and delivered. A, B, and C put in a joint defence denying that they are partners. D in a separate defence says that he is a mere *gomasta* and he supports A, B, and C in their denial of partnership. P has got to prove that A, B, C and D are partners. He calls a number of witnesses who had dealings with the firm for many years and they swear that they always knew A, B, C, and D to be the partners. In cross-examination they cannot support their evidence with any definite facts such as division of profits, for such facts can not be within their knowledge. They then go on inventing things, *e.g.*, that in some adjustment of accounts all four took part, or that the defendants admitted to them that they were partners, or that all four sometime or other actually took part in the dealings of the firm such as buying or selling, or giving or taking delivery, or making or receiving payments, or that the defendants always held themselves out as partners and, in short, they invent circumstantial evidence in support of their contention. False documents are produced to connect the defendants with the firm. Besides these, various other shifts and devices are resorted to. Thus, false evidence is given to support a case, true in fact but difficult of proof. To rebut this evidence, the defendants in their turn bring forward another set of mixed true and false evidence to establish their irrelation to the

firm. A, B, and C's non-participation in the business of the firm is easily proved. D's acts and conduct are not inconsistent with his being a *gomasta*. After careful consideration of a large mass of true and false evidence, the court comes to the conclusion that P has failed to prove that A, B, C, and D are partners. His suit is dismissed with costs."

"Take another illustration. A, B, C, and D are partners. A and B are the capitalist partners, C and D bring in no capital but get a share each for managing this business. The former have money; the latter have none. When sued, A and B deny that they are partners. C and D say they are the only partners and that A and B are mere creditors of the firm. The plaintiff notwithstanding a mass of evidence, partly true and partly false, finds himself unable to prove his case against A and B and has to be content with a decree against C and D, which is of no value to him. The impecunious partners are in these cases invariably put forward as the owners of the firm, the moneyed partners remaining in the background and supplying the sinews of war against the honest dealer."

"Instances may be multiplied to illustrate the defeat of just claims and the failure of justice in the tangled mass of true and false evidence."

"Leaving aside false oral testimony, books of account and letters are generally produced in these cases. It is a by-word in the corridors of the Courts that dishonest traders keep three sets of books—one for their own use, the second for use in Courts and in view of possible insolvency and the third for defeating Income-Tax authorities. Whatever may be the truth about this, it is common experience that false books and false entries in books are much too frequently used in Courts whenever the issue of partner or no partner is raised."

"The time and money spent in the trial of the issue of partner or no partner are always large. If truth prevails, the cost is out of all proportion to the benefit. If truth does not prevail, all is wasted."

"It has been suggested that the failure of justice indicated above and the mass of perjury and forgery may be avoided by the simple expedient of registration of partnerships. If provision is made for the compulsory registration of all partnerships with the names of all the partners and of all changes in the constitution of firms, and also that none but registered partners shall be deemed to be partners in any Court, the waste, indicated above, may be avoided. Further, persons dealing with firms will then know to whom they are giving credit. Such a provision will obviate the necessity of resort to dishonesty in

the manner stated above. No law can induce honesty, but it can deter dishonesty by rendering it futile."

" The practical suggestion therefore is the addition of a section to the following effect in Chapter XI of the Indian Contract Act. (IX of 1872)—

" An agreement for partnership can be made only by registered instrument which shall contain the names and addresses of all the partners and the date of the commencement of partnership. Any change in the constitution of the partnership, including the names and addresses of the outgoing and incoming partners shall also be registered. Registration as partner shall be conclusive evidence of partnership and no one whose name is not registered as above shall be entitled to claim any right or be liable as a partner in any suit or proceeding."

" *Explanation.*—In an agreement for partnership between a Hindu joint family and a stranger, the *Karta* for the time being shall represent such joint family."

" The addition of a clause to the following effect at the end of section 17, Registration Act (III of 1877) is necessary to give effect to the above suggestion—

" Instruments creating partnerships after the day of 1918 and all changes in the constitution of such partnerships shall also be registered."

" I desire to make it clear that the suggestion made in this note does not relate to or in any way affect Hindu joint family firms. There are obvious difficulties regarding such firms. Under the Mitakshara school of Hindu Law, for instance, a male child on birth acquires an interest in the family business. It is undesirable, if not impossible, to attempt to interfere with such interest by legislation. The suggestion made in this note relates only to contractual partnerships, such as are governed by the Indian Contract Act. It is necessary to make this point clear. So long as a business is a purely joint family business, with no stranger in it, the suggested registration will not apply. But directly a stranger comes into the business, it becomes a contractual partnership, the two contracting parties being the joint family, as a unit, of the one part and the stranger of the other part. Registration will in such a case be necessary. The joint family in the name of the *Kurta* will be registered, and the stranger in his own name. So long as the joint family is regarded as one unit, however much it changes internally by birth or death, there is no difficulty. The business of a single owner need not be registered. Nor, on the same principle, the business of a joint family which is really one unit. But as soon as a second person comes in, the business belongs to two, *i.e.*, the family and the stranger,

their relationship as between themselves being governed by agreement and not by birth. Shortly, registration will be compulsory if the partnership is contractual; not so, if the different persons interested in the business acquire such interest by birth and not by contract."

3. The Indian Industrial Commission, 1916—18, reported as follows:—

"The vexed question whether registration of partnerships should be made compulsory has been many times under the consideration of the Government of India within the past 50 years. The last occasion was in 1908, when the Bengal and Bombay Chambers of Commerce both prepared draft bills dealing with the subject; but their drafts were irreconcilable, and the Government considered that the proposals did not afford a basis for legislation."

"The other chief obstacles in the past to the introduction of compulsory registration have been, first the difficulty of excluding, and the hardship of including, small partnerships, of which there must be many thousands among petty shop-keepers and traders in all parts of the country; and second the difficulty of applying registration to transitory or single-venture partnerships, which are said to be common on the Bombay side. We see no reason why either small or single-venture partnerships should be exempted from the provisions of any legislation that may be found practicable; for to the former the analogy of custom in petty transactions in land would apply, and as Mr. Mitter points out, these are habitually registered without any trouble and at a very trifling cost; and the latter should be, and are, governed by the law which regulates partnerships. To meet in part these suggested difficulties, it has been proposed that a compulsory Registration Act, if introduced, should run at first in the Presidency-towns only; but we see no need for this restriction."

"Looking at the matter in its purely business aspect, it appears to us that throughout the main stumbling block in the way of compulsory registration has been the Hindu joint family system, and that the difficulties in this regard would to a great extent disappear, if Mr. Mitter's proposals were adopted; they have at any rate the two great advantages that a joint family can be registered as a single entity, and that it would be difficult for a person to deceive third parties by pretending that he was a partner, when in fact he was not or *vice versâ*. We, therefore, consider that Government should take an early opportunity of examining the whole question thoroughly with a view to legislation, and in so doing should invoke the assistance of the leading non-official lawyers in the chief business centres; for we believe that

few among minor measures would do more to develop confidence and promote business relationship between Indian firms and their constituents abroad, and especially between European and Indian firms in this country."

4. The proposal in our questionnaire to the effect that all partnerships with a capital of Rs. 500 and upwards should be required to be registered obtained considerable favour from witnesses in all the provinces. In some places, *e.g.*, Bombay, it was very strongly urged upon us as a reform of immense value. There is, however, very great difficulty in formulating for India a system of registration of partnerships.

5. We consider that it would be impracticable in India to insist upon the registration of business names on the analogy of the English Act of 1916. In India the names of firms are very frequently changed. No reasonable person puts much faith in the assumption that names appearing in the style of a firm are the names of the individual partners. The names of relatives, sometimes relatives long deceased, sometimes minors, are used because they are thought to be auspicious. There are other obvious difficulties connected with Indian names.

6. If partnerships were required to be registered, the difficulty as regards Hindu family businesses might be overcome by making the requirements to apply only to contractual partnerships. Where a stranger enters into partnership with the members of a Hindu family, it would be possible to provide that the family might be treated as a single person or unit for purposes of registration. In like manner the difficulty presented by small partnerships is not, we think, insuperable in itself. It might be met either by refusing to make any exception in their favour or by exempting partnerships whereof the capital does not exceed Rs. 500. Transactions in land, if of the value of Rs. 100, are at present registered as required by law. There seems to be no insuperable difficulty here. A greater difficulty is presented by the transitory or single joint ventures. On this subject the provisions of the Contract Act are somewhat different from those of the English Partnership Act, and very careful drafting would be necessary to embody the distinction between partnerships and joint adventures.

7. The real difficulty lies in the principle of law, whereby the creditor of a firm is enabled to sue a person, of whose existence he may not have known at the time of the transaction and to whom he did not give credit, merely by reason of the fact that the person sued was in fact a partner. This is the doctrine of the liability of an undisclosed principal. It would no doubt be possible, if all partnerships had to be registered, to lay down that as each creditor could discover from the register the names of the partners, no creditor should be allowed to hold any one responsible for a firm's debt whose name was not registered as a partner at the time of the transaction. This, however, would be to hamper creditors rather than to help them. We consider that any such provision

would enormously facilitate arrangements of a *benami* character whereby persons with money would be enabled to engage in trade under colour of the names of men of straw providing them with a certain appearance of having a prosperous business while at the same time running no risk themselves. We are unable to recommend that the law should refuse, at the suit of a creditor, to enquire into the question whether in truth and in fact the defendant was not a partner. We think that any such provision is calculated to do much more harm than good.

8. As between partners themselves, however, we think that the requirement of registration at all events in cases in which the capital at the commencement of the partnership exceeded Rs. 500 might be insisted upon, that is to say, that no one should be allowed to bring a partnership suit for accounts of the partnership or otherwise to enforce a partnership unless he and the persons against whom he proceeds were duly registered. It would probably not, however, be advisable to prevent such a person taking steps to bring his liability to an end by obtaining a dissolution. Under the English Money-lenders Act and Business Names Act the penalty for non-registration is that the defaulter is unable to enforce the contract of the firm. No such provision would, in our opinion, work at all well in India. We think that the probable result would be that in the case of just claims made by *bonâ fide* partners, defences would constantly be put forward on the allegation that some unregistered person was a partner and that accordingly the firm's contract was unenforcible.

9. We appreciate therefore that registration of partnerships cannot be recommended as a means for avoiding the main class of disputes, *i.e.*, in cases where a person is sued by a creditor of a firm as being really in the position of an undisclosed principal, nor would it be of service in cases of estoppel by " holding out ". We think, however, that if as between partners *inter se* registration was compulsory, the existence of such a rule would do much to enable persons dealing with firms to protect themselves. Partnerships that were not registered at all would, we think, be looked upon with suspicion and would find it difficult to obtain credit. It would, we think, be quite possible and reasonable to enforce registration as against the partners by providing that the omission to register could be dealt with in criminal courts, much in the manner in which a similar omission falls to be dealt with under the English Business Names Act. The criminal court might be given some wide discretion to have regard to the circumstances of each case before imposing a fine or even entering a conviction. If in addition to this the law refused to entertain partnership suits as above suggested, it would not be necessary to enact that unregistered partnerships should be treated as though they were illegal associations incapable of suing or being sued as such. Provided that the evil consequences of failure to register were limited as above proposed, we think that a system of registration can and should be introduced.

CHAPTER 38.

Wills and Intestacy.

1. The Indian Succession Act (X of 1865) is in substance an exposition of the English law as regards wills and intestacy. It contains the general law upon these subjects since it is expressed to apply to all cases of intestate or testamentary succession "except as provided by this Act or by any other law for the time being in force." It is, however, misleading, save from a technical standpoint, to regard it as being really the general law of India, because Hindus, Mohammadans and Buddhists are expressly excepted from its provisions and Government has power to make special exceptions for other persons also.

It is not necessary for our present purpose to consider in detail the minor exceptions, nor is it necessary to enumerate the special statutes which have from time to time been passed to deal with special classes of people. We may note the existence of such a statute as Act I of 1869 which is applicable to Talukdars in Oudh and which requires that in certain cases wills made by them must be executed and attested three months before the death of the testator and must be registered within one month after execution. We may note also the Malabar Wills Act (Madras Act V of 1898) under which the wills of a certain limited class of people are required to be in writing and attested. The case of Indian Christians may also be instanced as dealt with by the legislature in a special manner.

2. Putting aside all special cases, we come to a statute which though limited as regards the area affected and the classes of people affected, makes a wide breach in the rule that the principles of the English law of wills are inapplicable to Hindus, Mohammadans and Buddhists. The Hindu Wills Act (XXI of 1870) was passed to regulate the wills of Hindus, Jains, Sikhs and Buddhists in the Lower Provinces of Bengal and in the towns of Madras and Bombay. It was intended to provide rules for the execution, attestation, revocation, revival, interpretation and probate of the wills of the members of these communities. Under the combined operation of the Hindu Wills Act (XXI of 1870) and the Probate and Administration Act (V of 1881) numerous sections of the Indian Succession Act (X of 1865) are extended to all wills and codicils made by the persons described above on or after the 1st day of September 1870 within the area already referred to and to all such wills and codicils made outside such area so far as relates to immovable property situate within it. The primary result of the Hindu Wills Act where it applies at all is to invalidate all wills except those written and attested as prescribed by the Succession Act. Moreover, as section 187 of the Indian Succession Act is made applicable to all wills to which the Hindu Wills Act applies, it is necessary not merely that the will should be duly written and attested but that

probate should be taken of the will after the testator's death if any right as executor or legatee is to be established under the will in a court of law. This involves the payment of what may be called probate duty; it is in form a court-fee under the Court Fees Act (VII of 1870) and is calculated as a percentage on the value of the estate.

The Hindu Wills Act does not apply to any case of intestate succession, and section 190 of the Indian Succession Act is inapplicable to Hindus whether in Bengal, in a Presidency Town or elsewhere. Letters of Administration to an intestate's estate are not in form compulsory in the case of Hindus, Mohammadans, Buddhists or other persons excepted from the Indian Succession Act.

3. The Probate and Administration Act (V of 1881) applies to all persons to whom the Indian Succession Act does not apply, that is, broadly speaking to all Hindus, Mohammadans and Buddhists. It provides machinery whereby probate or letters of administration may be taken out to the estate of any such person deceased. It does not however make it compulsory upon anyone to apply for probate or letters of administration. The use of this statute is in form purely optional. Under it the will of a person entitled by his own law to make an oral will may be proved. If, however, probate or letters of administration are sought under this Act the court-fee representing "probate duty" is charged on the value of the estate. This not unnaturally discourages such applications.

4. Certain types of debts due to a deceased person cannot with safety be discharged by payment to an alleged representative in the absence of probate or letters of administration. The interest on Government paper is an obvious example. Again, courts of law cannot be asked to pass a decree against the debtor of a person deceased in favour of the plaintiff without some proper evidence that the plaintiff is the true representative of the deceased. Hence it is provided by the Succession Certificate Act (VII of 1889) that the district court may grant a certificate specifying certain debts and securities and empowering the person to whom it is granted to receive the interest or dividends thereon or to negotiate and transfer the securities or any of them. The court-fee payable is an *ad valorem* fee based on the value of the particular debts or securities comprised in the application for certificate—not on the value of the whole estate. Such certificates are not given where the right of the representative ought to be established by taking out probate or letters of administration, *i.e.*, in the case of deceased persons governed by the Indian Succession Act or the Hindu Wills Act.

Again, courts in the Presidency towns do not grant such certificates and the right of other courts to grant them is limited in an ordinary case by the fact that the deceased must at the time of his death have ordinarily resided within their jurisdiction. It happens therefore that persons who are not by any statute obliged to take out probate or letters of administration are in effect compelled to do so in order to realise certain specific debts and securities. In such cases they pay court-fee on the whole estate.

5. The broad effect of the existing legislation is that except as regards Hindus, Jains, Sikhs and Buddhists in lower Bengal and in the Presidency Towns, Hindus, Mohammadans and Buddhists are outside the compulsory effect of the Probate law. No particular form of will is enjoined for them: though it is not obligatory upon them to obtain probate or letters of administration with the will annexed according to Act V of 1881, yet District Delegates have been empowered to grant probate or letters of administration with the will annexed in those cases in which the parties themselves seek to obtain the same. Where no such application is made, the question of the validity of a will arises as an issue in an ordinary suit. In such cases an oral will is just as valid and can be enforced in the same way as a written will. Of course if the will is oral, the strictest proof will be required of it. But a paper drawn up in accordance with the instructions of the testator even though not signed by him is a good will. Petitions addressed to official and answers to queries from public officers have been held to have the force of testamentary instruments. Though nuncupative wills are rare and are very difficult to establish and though the volume of litigation based upon such wills is not considerable, yet when the issue arises it has to be decided almost solely on the balance of conflicting oral testimony. If no form be required for a testamentary instrument, any scrap of paper may be used to convey the intentions of a testator. Again, the courts will have to decide issues which arise in such a suit mainly upon oral evidence. If the signature of the testator and the attestation of witnesses be not necessary, the opportunity is great for false claims to be put forward in support of testamentary dispositions of property. With no system which compels any person to place before a judicial tribunal a testamentary instrument within a reasonable time following the death of the testator, it is not unusual for wills to be put forward many years after. In these and other ways the time of the court is occupied in deciding issues on evidence which is neither definite nor beyond doubt.

6. It has been suggested to us that at the present time it is both possible and desirable that in each province legislation should be introduced for extending, at least to all Hindus, the requirement that a will should be in writing and attested and also the requirement embodied in Section 187 of the Indian Succession Act, namely, the requirement of taking out probate. In each province there may well be areas in which the conditions as to education and otherwise necessitate an exemption. Whether it would be in any province possible or worth while to apply such rules to the Mohammadan community is a matter for special consideration by the Local Governments.

7. So far as the requirements of writing and attestation go it seems to us that the experience gained by the operation of the Hindu Wills Act in the present provinces of Bengal and Bihar and Orissa shows that these requirements may be laid down in the case of Hindus with considerable advantage. It can be objected that villagers are

ignorant; that most are illiterate and that people conversant with the requirements of a valid will might not easily be available in rural areas. It is, however, difficult to maintain that this objection applies throughout the whole of India with greater force than within the area subject to the Hindu Wills Act. The law as to wills is in the Hindu Law, as in the Common and the Civil Law, a late addition. We do not feel that objection can be taken on the ground of interference with rules of Hindu Law that have been or are regarded as having a special sanctity. Madras Act V of 1898 already referred to is, as we understand it, a statute which imposes the requirement of writing and attestation without the requirement of probate. We understand that at the present time a proposal is under consideration in the Madras Presidency for extending to the wills of all Hindus a similar rule. It seems to us that legislation on this principle would do something to prevent long and belated inquiries having to be held by courts of law and that in other provinces also such legislation would be useful.

8. Whether probate of such wills when made should be compulsory or not is a further and a much more difficult question. Unfortunately when we come to consider whether probate of such wills should be made compulsory the question of law reform meets a question of finance. Taxation is a matter beyond our province and it is no concern of ours to advocate that any estate be burdened with additional taxation. We do not think that any extension of the probate law would have much chance of favourable consideration in any province if it be regarded as a manifest forerunner of serious additional taxation. The incidence of the court-fee which we may refer to as probate duty is, as we have shown above, controlled by divers considerations which lead in the end to considerable anomaly. There is necessarily a considerable inequity in any system which exacts probate duty in the case of a will but not in the case of intestate succession. We appreciate, therefore, the difficulty of the financial question. Considering the matter entirely in the interests of the administration of the law, it appears to us, however, to be a pity to rule out an extension of the provisions of the Hindu Wills Act to provinces outside lower Bengal for purely financial reasons. If the financial difficulty can, in any reasonable way, be accommodated we think that it is worthy of consideration whether to enable a proper probate system to be applied to Hindu Wills generally throughout India some differentiation might not be made as regards probate duty according as the testator had deposited the will in his life time with the registrar or registered it under the Registration law or had omitted to take either of these precautions. We do not think it is advisable to insist upon the registration of wills or the compulsory deposit thereof with the registrar but to encourage deposit or registration would be highly useful.

9. We would add here a short note as to certificates granted under sections 31 and 32 of the Administrator-General's Act (III of 1913). In Bombay it was suggested to us that the limit of value therein mentioned should be raised from Rs. 1,000 to Rs. 3,000. The pro-

cedure by certificate of the Administrator General is simpler and quicker than the ordinary procedure for obtaining letters of administration from the Court. It is a great convenience to everyone concerned with small estates and in particular to Insurance Companies. The conditions under which such certificates are granted fully safeguard the revenue and they are acted upon only in respect of such assets as are mentioned in the certificates. The proposal was urged upon us in Bombay mainly by reason of delays occurring in the office of the Testamentary Registrar in the High Court. It seems to us that the proper remedy is to strengthen this office. At the same time there can be no doubt that procedure by certificate is intended to be and always will be simpler than the ordinary procedure, and we would like to see its benefits extended as proposed. This would involve careful consideration by financial authority of the proper rate of fee to be charged upon such certificates as regards assets exceeding Rs. 1,000, and of the limit of exemption from the court fee payable upon applications for Probate or Letters of administration.

CHAPTER 39.
Attestation of Mortgage Deeds.

Another direction in which it appears to us that the law embodied in the Transfer of Property Act should be modified, relates to the attestation of mortgage deeds. Before that Act was passed there was no law requiring the attestation of such deeds. Under section 59 of the Act, except in the case of mortgage by delivery of possession of property of the value of less than Rs. 100, mortgages can be effected only by a registered instrument signed by the mortgagor and attested by two witnesses. Prior to the decision of the Privy Council (Samu Pattar's case) given in 1912 and reported in I. L. R. 35, Madras, 607, it was held in several cases that it was not incumbent on the mortgagor to affix his signature to the instrument of mortgage in the actual presence of the attesting witnesses, but that it was sufficient if he acknowleged his signature before them. By the above decision, it was held essential to the validity of a mortgage instrument that the mortgagor should sign the document *in the presence* of the attesting witnesses: and that they must affix their signatures *after* they saw the executant sign the document; mere acknowledgment of his signature by the executant before the witnesses is not sufficient.

2. The hardship wrought by the change in the interpretation of the law was so great that the Legislature had to interfere by passing the Transfer of Property Validating Act, XXVI of 1917, the second section of which lays down that a mortgage or gift executed under the Transfer of Property Act, 1882, shall not be deemed to be invalid by reason only that any person who purported to attest such instrument as a witness did not see the executant sign it, provided that such person before signing his name on the instrument received from the executant *personal acknowledgment* of his signature to the same. The Act applies only to transfers of property made prior to 1st January 1915, and to the United Provinces of Agra and Oudh, but the Governor-General may extend the Act to other provinces.

3. Unfortunately experience has shown that the requirement of attestation in the strict sense of the Privy Council's decision gives rise to many false pleas. Having regard to the rules in sections 68—71 of the Evidence Act which require the examination of at least one attesting witness, mortgagees have been placed at the mercy of unscrupulous persons who acted as attesting witnesses. Such witnesses when won over by the mortgagor depose that they signed after obtaining from the mortgagor an acknowledgment of his signature but without actually seeing him sign. It does not seem necessary to insist upon the execution being proved to have taken place in the presence of the attesting witness. It would be sufficient if mortgages are attested in a manner similar to that pro-

vided for in the case of wills by the Indian Succession Act (section 50). We think that a provision to this effect should be inserted in the Transfer of Property Act by way of amendment. The requirement of the Indian Succession Act is as follows:—

> "The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will or have seen some other person sign the will in the presence and by the direction of the testator, *or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person;* and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

4. It has been suggested to us that this will not be an effectual relief from the exactions of unscrupulous attestors and that the provisions of sections 68 to 71 of the Indian Evidence Act should be made inapplicable to mortgage deeds; indeed some opinions go the length of advocating the deletion altogether of the provision in section 59 of the Transfer of Property Act relating to the attestation of mortgage deeds, and would be content to leave mortgage deeds in the same position as sale deeds. There is considerable force in these suggestions as, when a document is registered, there is an admission by the executant of the fact of his having signed the deed of mortgage. We are not, however, prepared to recommend the repeal of the provision as to attestation in section 59. As regards the requirements of the Evidence Act, we make a recommendation in our Chapter on Evidence.

CHAPTER 40.

Suits by reversioners on the death of a Hindu Female heir.

The present state of the law relating to the powers of alienation of the female heirs of a deceased Hindu who take a "limited estate" in immovable property is unsatisfactory and is a prolific source of litigation. A large number of land or "title" suits in many of the provinces are by reversioners (1) against these "limited" owners and their transferees or (2) against the latter after the death of the limited owner, calling in question the validity of the transactions entered into between them. They are almost always contested and give rise to very great uncertainty. In the second class the propriety of the alienation is very often called in question long after the transaction. When the alienation is thus attacked, the transferees naturally find it difficult to support it on account of the disappearance by that time of the direct evidence required to prove the binding character and validity of the transfer according to Hindu law. In the Punjab, Muhammadan widows sometimes succeed to their husbands' lands where there are no sons or descendants in the male line and they hold such lands for life or till they marry again, exactly in the same way as Hindu widows. Suits to set aside alienations made by Mahommedan widows or to have them declared void except for life or till remarriage of the widow appear to be quite as numerous in the Punjab as suits to set aside alienations made by Hindu widows.

2. In the following extracts from the statement of objects and reasons prefixed to a private bill introduced in the Madras Legislative Council by Diwan Bahadur M. Ramachandra Rao in 1915, the evil to be remedied is thus indicated.

> "It is now settled by a long course of decisions of the Judicial Committee of the Privy Council and the courts in India that a Hindu widow takes only a restricted estate in the property of her husband and that at her death such property passes to the heirs of her husband except as to such portion as may have been alienated by her for legal necessity. Alienations of her husband's estate, or portions thereof for legal necessity, which includes the payment of her husband's debts and other charges on the estate, such as the payment of maintenance, debts incurred for the funeral obsequies of her husband and for other primary religious purposes, are valid and bind the actual reversioner succeeding to the estate on the death of the widow. The propriety of these transactions is generally called into question only after the death of the widow several years after they are entered into, when most of the evidence in regard to them had disappeared.

This has operated very much both to the detriment of the widow and the purchasers. Even in cases where the widow had to dispose of the whole of her husband's estate or such portion as may be necessary for purposes recognised by law as affording a justification, the widow is not able in most cases to realise the full value of the property. The intending purchaser has at present no guarantee whatever that the transaction will not be called into question after the death of the widow and the widow is therefore driven to dispose of the property at much below its fair price which it would have fetched had the disposition been by a full owner. On the other hand the purchaser is still liable to be sued by the reversioner after the death of the widow and the burden of making out the validity of the transaction is thrown on him many years after it takes place."

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"It is often beneficial and even necessary in many cases for the limited owner to exchange a portion of the deceased male owner's property for other property. If the party entering into the transaction were a full owner, he could effect the change without any difficulty, but there is a legal impediment in the way of the widow or other limited owner doing the same. The Hindu Law does not authorise a transfer by way of exchange by a limited owner and it has been held that she cannot make an alienation of the estate in order to improve it or even to develop the estate."

* * * * * *

"The law in regard to mortgages by limited owners is also equally unsatisfactory. In executing mortgages it has been the usual practice of the country to mention merely the particular legal necessity which has compelled the widow to borrow funds without expressly specifying whether her own life interest or the entire estate is hypothecated. It is open to the widow to pledge her own limited interest even for debts binding on the estate or to make it clear that she intends to bind the entire estate of the last male owner for the amount secured by the mortgage. This question is most often raised after a sale is held in execution proceedings. To find out what interest has actually passed to the purchaser it has been held that the pleadings, the documents sued on, the decree and all subsequent execution proceedings will have to be scrutinised by the court with a view to ascertain the intention of the parties. (I.L.R. 34 Madras, 188 I.L.R. 37 Madras, 22). There is therefore a great deal of uncertainty in finding out the interest disposed of at court sales where limited

owners such as a widow or a daughter are judgment-debtors."

"It is proposed to empower, with the permission of the court, the limited owner to execute a mortgage or a lease for any purpose binding on the estate and that, in that event, the mortgage or lease will have the same effect as if it were executed by the last full owner. The limited owner, the mortgagee and the lessee will, it is expected, be placed in a better position by this provision and intending purchasers will be relieved of the difficulties and pitfalls now existing in regard to execution sales."

3. The time has, in our opinion, come for devising some measure to combat the evil, to diminish in a substantial manner the volume of this species of intricate litigation and to afford appreciable relief to courts, to protect *bonâ fide* transferees, limited owners and reversioners alike.

4. Objections to the interference with the existing law in any manner were not wanting when opinions were called for on the bill by the Madras Government. A widely representative opinion may be quoted here, *viz.*, that of Diwan Bahadur Y. Janakiramayya (retired district judge):—

"The person entitled to inherit the property of the male owner, on the death of the limited owner is not necessarily the same presumptive reversioner living at the time of the alienation, and, in most cases, it may so happen that the presumptive reversioner living at the time of the transfer, dies before the death of the limited owner which is the starting point for succession, and some other reversioner might be entitled to inherit the property actually; the provisions of the present bill render the transfers made by the limited owner in the above circumstances binding and conclusive against the latter also, and in my humble opinion they defeat and strike at the root of the rule of the Hindu law (that after a Hindu widow or daughter it is the nearest male heir *then living* that succeeds)."

"It may be said on the other hand that the two conditions imposed, *viz.*, (1) the consent of the then presumptive reversionary heirs for the transfer and (2) the order of the court made after hearing both parties and recording evidence on both sides, are sufficient safeguards, but they are not so."

"A limited owner who wants to make a transfer of the property may easily purchase the consent of the then presumptive reversionary heirs by paying them some bribe and the latter may not care at all to consider if the proposed transfer is really for the benefit of the estate, as they are not sure that they will survive the widow and get the

estate for themselves or for their own heirs. The interest which the presumptive reversionary heirs possess in the property at the time of the contemplated transfer, is merely a contingent one and very uncertain and they might very properly think it better and more profitable in their own interests to give away their consent for any money they can get, and consent to the transfer of the property which they or their heirs might not eventually get, thus availing themselves of the common saying that 'a bird in the hand is worth two in the bush.'"

"The case of the limited owner is also similar. Until the whole property is exhausted and with a view to secure some private fund for herself, or for her own relations, she may try to invent some necessity, or the other, for transferring the property, which she knows full well, goes on her death to persons in whom she is not at all interested and who may even be her enemies, and being guided by such motives, she may not care to secure proper and adequate price for the transfer."

"Now turning to the intending purchasers, they will always try to take advantage of the new bill, and directly, or indirectly and by various means, fair or foul, induce the limited owner, to alienate the property for quite an inadequate consideration. In this connection it may be remembered that that limited owners are, as a rule, uneducated and ignorant, lacking worldly experience and wisdom owing to their peculiar social position and conditions, and how easily they can be misled and defrauded by others, can be conceived very easily."

"As regards the court's orders the limited owner and the then presumptive reversionary heirs would be the only chief parties to the proceedings, and when they are guided by the personal considerations abovementioned, there can be no guarantee that they place all the facts and materials before the courts, and in the absence of such a guarantee the courts cannot be expected to pass right orders. Also, the presumptive reversionary heir may not care to collect all the available evidence and place it before the court, as he is not immediately benefited materially in any way by doing so, and as his succession to the property, if any, is very uncertain and doubtful. When the limited owner and the then presumptive reversionary heirs as well as the intending transferees combine together and act in collusion, it is possible and even probable, to have the required order passed by the court without any difficulty."

"No doubt, the present bill may stop the litigation now going on, to some extent, but it is greatly feared that if the bill were to be passed into an Act, not a bit of the pro-

perty inherited by a limited owner, would hereafter be left untransferred by the time of her death, and thus the rule of the Hindu law referred to *supra*, would virtually be a dead letter."

"Under the present law, there is a chance for the reversioner that survives the limited owner and actually inherits the property, to impeach collusive transfers made by the latter; and also the transferor, as well as, the transferee acts very carefully on account of that fear; and these are, in my humble opinion, a check to some extent against collusive alienations by a limited owner. Under the present bill, these checks are altogether removed and it seems to me to be very unjust to deprive the reversioner that is entitled to inherit the property under the law, of all his rights and chances to establish them, to shut his mouth and bind him by a transaction, or an order to which he is not a party."

5. The Indian judges of the Madras High Court, *viz.*, the late Sir S. Subramanya Aiyar, Sir Sadasiva Aiyar, Mr. T. V. Seshagiri Aiyar and Sir C. V. Kumaraswami Sastri accepted in the main the need of legislation on the lines of the proposed Bill. Sir S. Subramanya Aiyar desired to go much further than the Bill and wanted to restore the Hindu Law to what it was before the rule grew by a misunderstanding of the text of Yagnavalkya relating to the estate taken by female heirs in property acquired or inherited by them. The following is an extract from his minute:—

"At the very outset, I beg to say with the utmost deference to all concerned that the state of the law in regard to Hindu limited owners, dealt with by the bill, is most unsatisfactory and calls for immediate remedy by way of legislation. The present state of things is entirely due to the innovation introduced quite unconsciously, almost by a gradual imperceptible process by judicial decisions really within the last thirty-five or forty years in regard to the nature of the estate devolving on Hindu women in property inherited by them from their relations. This innovation consisted in holding that in such cases the taker is entitled to the property only during her life, and that on her death the succession to the property was not to her own heir, but to the heir of the last full owner, as that owner was called. This doctrine of reverter, as it is spoken of, was absolutely unknown and foreign to the system of Hindu law followed in this Presidency previously for centuries. This new doctrine had its origin in Bengal and first found its way into the decisions of the courts in that Presidency in cases governed by the Dayabhaga school of law. Later on the doctrine was applied even to cases governed by the Mitakshara school of law, as administered in that Presidency. This extension was eventually

upheld by the Privy Council in certain Bengal cases, and the High Court in this Presidency felt bound to follow, in cases which came before it, such rulings of the final authority. That all these decisions proceed upon a total misunderstanding of the passage of the Mitakshara on which they purport to rest is no longer controvertible. The error was due to the judges having had to act on imperfect information. They were thereby completely misled as to the indisputable import of the passage. Research made by eminent lawyers and judges since the date of the leading erroneous decision, has established beyond doubt that the law as laid down in that passage gave full and complete title to every woman in property inherited by her and that such property was to descend to her own heirs and not to those of any predecessor of hers. This is now acknowledged by all the high authorities on Hindu law, but such acknowledgment is of little avail unless the legislature will step in and rectify matters. No doubt such legislative interference would be uncalled for, were the error of the courts not productive of the incalculable mischief which is accruing to the community as a direct consequence of it, and which shows no tendency to diminish. Put in a few words, the result of the new doctrine is constantly recurring ruinous litigation, uncertainty of titles in connection with estates large or small, unrighteous speculation in law suits and much perjury. In my humble judgment the best, safest and most acceptable remedy is to restore the law of the Mitakshara by a declaratory enactment to that effect."

* * * * * *

"Lastly I submit, even if any section of the Hindu community has come to reconcile itself to the existing state of the law on the point in question, that ought not to prevent legislation necessary to avert the public mischief due to such a state of the law. It remains for me briefly to indicate the course to be followed if the change I advocate be held impossible, which, I hope, will not happen. In that case the limited owner should be enabled in conjunction with her immediate reversioners, for the time being, to delimit the estate, if I may use such an expression, so as to make the property free from the qualifications and conditions which give rise to the anomalies now affecting the possessions of Hindu limited owners. While no doubt it is necessary to recognise limited ownership, as part of a general system of inheritance it is absolutely opposed to the well being of the community governed by such a law of inheritance. The rule introduced long ago, permitting a limited owner to renounce in favour of the next reversioner, would afford ample justification for a law to enable immediate

reversioners to co-operate with the limited owner for enlarging her estate and thereby put an end to the difficulties which are unavoidable so long as her estate continues a limited one."

"' I have no hesitation in saying that it is a misnomer to speak of the right of a Hindu reversioner as a right in any proper sense of the term. It is in reality but a chance and in many cases a very remote chance only. That is why the Transfer of Property Act has made these chances worthless as objects of any legal transaction by declaring that a transfer of the right of a Hindu reversioner is utterly null and void to all intents and purposes. The truth is that the limited estate and the reversionary rights in question are judicial creations, inherently incapable of being made so as to work without friction. For on the one hand the majority of persons in the category of reversioners are unconnected by blood with the limited owner and thus parties in whom she feels no interest whatever. Again, on the other hand, the law permits her in certain circumstances, to enter into transactions on their behalf also, so as to bind them. In this state of things it is inevitable that conflicts between the limited owner and the large body of reversioners should continue to arise during the whole term of the existence of the limited ownership. No legal ingenuity can devise measures for ensuring good relations between parties so situated with reference to each other. The best solution of the difficulty which has been the outcome of judge-made law is, as I have said, the restoration of the law under which such conflicts of interest did not exist—a law which prevails to this day in the neighbouring French Settlement of Pondicherry governed by the Mitakshara, as is also this Presidency."

6. The evidence taken by us was fairly divided. While almost everyone realised the existence of the evil, some were against all interference. This attitude seems to us to be unduly despondent or unduly conservative, though we appreciate the force of many of the objections to the Limited Owners Bill. A female heir under the Hindu Law is not the owner of a life estate. Her estate is that of the owner for the time being but with some restrictions as to alienation. For many purposes she represents adequately and completely the estate she inherits. As we have seen there are some who take the view that the Mitakshara never contemplated a female heir taking what is called a " limited " estate. Moreover, as it is, a female heir can alienate the whole estate for purposes binding on the ultimate reversioner. She is almost the absolute owner of the income and it is her own heirs that ordinarily succeed to it if left unspent. There is nothing to prevent her surrendering the estate to the presumptive reversioner, if she chooses, and the actual reversioner at her death will be bound by it, even, it would seem, though she retains a part for her maintenance.

7. Many of those who favoured us with their views, realising the existence of the crying evil, suggested various remedies the principal of which are as follows:—

(1) Reduction of the period of limitation prescribed by both Articles 125 and 141 of the schedule I of the Indian Limitation Act.

(2) Procedure by way of originating summons to get the sanction of a court for the alienation.

(3) Action to perpetuate testimony, as under Order 37, rules 35 to 38 of the Rules of the Supreme Court (England) to preserve evidence which may otherwise be lost.

(4) A special enactment on the lines of the Madras Limited Owners Bill of 1915.

8. We shall first consider the question of Limitation. Articles 125 and 141 of the Indian Limitation Act run as follows:—

Description of suit.	Period of Limitation.	Time from which period begins to run.
125. Suit during the life of a Hindu or Muhammadan female by a Hindu or Muhammadan, who if the female died at the date of instituting the suit would be entitled to the possession of the land, to have the alienation of such land made by the female—or a sale held in execution of a decree against her—declared to be void except for her life or until her re-marriage.	Twelve years . .	The date of the alienation.
141. Like suit [*i.e.*, for possession of immovable property] by a Hindu or Muhammadan entitled to the possession of immovable property on the death of a Hindu or Muhammadan female.	Twelve years . .	When the female dies.

Article 125 is expressed to apply to suits instituted by the presumptive reversioner, that is, by one who if the limited owner died at the date of the suit would be entitled to possession. A more remote reversioner may, however, in some circumstances maintain a suit for a declaration that a Hindu widow's alienation does not bind the reversion, *e.g.*, if the next reversioner refuses without sufficient cause to sue or has concurred in the alleged wrongful act or is acting in collusion with the widow or is precluded by his own act or conduct. There are also other circumstances which may give him the right to sue. Until recently it was thought by some authorities that any such a suit fell under Article 120, which is a residuary article providing six years from the date when the right to sue accrues. In the view, however, of a Full Bench of the Madras High Court in a case to which we will shortly refer this opinion is erroneous. ["Varamma *v.* Gopaldasayya" I. L. R. 41, M. 659.]

It is, however, clear that under the present law the omission on the part of the presumptive reversioner or of all reversioners to institute a suit such as is contemplated by Article 125 does not prevent the institution of a suit for possession by the ultimate reversioner under Article 141 upon the death of the widow.

9. A sale in execution of a decree against a widow may not be an alienation within the meaning of article 125 and a suit for a declaration in respect thereof was held to fall under article 120. Whether a remote reversioner claims through the presumptive reversioner and in what classes of cases he should be deemed to so claim are matters in which different and divergent views have prevailed.

10. In a suit under article 141 the right to sue accrues only on the death of a Hindu female. Where there are successive female heirs time runs when the last of them dies. The rule is extended to Mahommedans where they have adopted or as in the case of Hindu converts to Islam, have retained the Hindu law of property. When the ultimate reversioner brings a suit the alienee from the female heir is bound to prove that the alienation has been made for justifiable necessity. Very often, the female heir or a succession of them live for three decades and more after the date of the alienation. The Hon'ble Mr. (now Sir) B. N. Sarma in his speech in the Madras Legislative Council when the Madras Limited Owners Bill was introduced, referred to a case in which an alienation of this kind was attacked after an interval of more than eighty years and one of us has tried a case in which the question arose sixty years after the alienation. It is obvious that any investigation made as to justifiable necessity after the disappearance of all the relevant and direct evidence must lead to a mass of perjured testimony being put forward with no satisfactory result. In such cases special consideration is no doubt given in favour of the alienee on whom the burden of proof lies but this is no certain benefit. Many of the witnesses who appeared before us advocated the modification of this rule of limitation in such manner as to minimise the great waste of time and manifest insecurity to title, engendered by the existing state of the law.

11. One suggestion is to retain article 141 as it is and reduce the period of twelve years to three years so that the plaintiff may come into court as early as possible after the widow's death. A further suggestion has also been made, that if the presumptive reversioner does not bring a suit to set aside the alienation within twelve years after the alienation becomes known to him, he and all other reversioners should be debarred from claiming the property after the death of the female. In similar cases the provision prescribed in the Punjab Limitation Act of 1900 was stated before us to have worked satisfactorily. In a recent case [Varamma *v.* Gopaladasayya I.L.R. 41, M. 659] a full Bench of the Madras High Court has held that a suit by a reversioner to set aside an alienation by a Hindu widow is a representative suit on behalf of all her reversioners then existing or thereafter to be

born and all of them have but a single cause of action which arises on the date of the alienation. Hence if by failing to sue within the twelve years allowed by article 125, the claims of existing reversioners became barred by limitation, reversioners thereafter born are equally barred. As already pointed out, under the Hindu law, as it stands now, the female heir can at once surrender the property to the presumptive reversioner and the ultimate reversioner will ordinarily be bound by her act. It has been even held that a Hindu widow could, reserving some property for her maintenance, surrender the rest of the property. In the case of partial alienations, if the presumptive reversioner consents for a consideration and becomes the ultimate reversioner it would seem that he as well as his sons will be estopped from contesting the alienations. In any case the consent even without consideration of the then presumptive reversioner will be a valuable piece of evidence to uphold the alienation. In fact some judges are of opinion that this will shift the onus of proof and the ultimate reversioner will have to prove want of necessity. It is well known that in the case of old alienations this factor almost decides the case in favour of alienees. Notwithstanding that no length of possession adverse to the female heir would bar the reversioner and although he has twelve years reckoned from her death within which to sue, yet if she sues to recover the property from a person in adverse possession and fails, the reversioner may be barred by the decree. We make these observations to show that the doctrine that no act of the presumptive reversioner should prejudice the ultimate reversioner is not an absolute doctrine. In the circumstances we think that a very reasonable solution may be found by enacting that if none of the presumptive reversioners brings a suit to set aside the alienation or a sale held in execution of a decree against her, to have it declared void (as contemplated in article 125), all reversioners should be debarred after a certain time from instituting such a suit or claiming the property after the death of the limited owner. A suggestion to this effect will be found in the case cited (I. L. R. 41, Mad.) at page 677 in the judgment of Sadasiva Ayyar, J., who would add to article 141 the words "or 24 years from the date of the alienation not declared invalid by decree in an appropriate suit, whichever term first expires."

12. Those who suggested the adoption of the practice relating to "perpetuation of testimony" and "originating summons," have not put forward any definite proposals. The Limited Owners Bill of Diwan Bahadur M. Ramachandra Rao seems to combine the procedure relating to both these matters as described in the Orders and Rules of the Supreme Court.

Order 37, rules 35 to 38 of the Rules of the Supreme Court relate to actions to perpetuate testimony.

Rule 35 runs as follows:—

Any person who would under the circumstances alleged by him to exist become entitled, upon the happening of any future event,

to any honour, title, dignity, or office, or to *any estate or interest in any property, real or personal, the right or claim to which* cannot by him be brought to trial before the happening of such event, may commence an action to perpetuate any testimony which may be material for establishing such right or claim.

Under rule 36 the Attorney-General has to be made a party in all actions in which the Crown may have any estate or interest in the matter of any action under rule 35. Under rules 37 and 38 witnesses shall not be examined to perpetuate testimony unless an action has been commenced for the purpose and no action to perpetuate the testimony of witnesses shall be set down for trial.

An " originating summons " means every summons other than a summons in a pending cause or matter [Order 71, rule 1 (*a*)]. The form and issue of originating summons, appearance to and attendance under such summons are provided for by Order 54, rules 4-B, 4-C and 4-D.

In any division of the High Court any person claiming to be interested under a deed, will or other written instrument may apply by originating summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested (Order 54 (*a*), rule 1). But " the court or judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons."

Any person claiming to be interested in the relief sought as creditor, devisee, legatee, next-of-kin or heir-at-law or customary heir of a deceased person may take out, as of course, an originating summons returnable in the Chambers of a judge of the Chancery Division for such relief of the nature or kind following as may be by the summons be specified and as the circumstances of the case may require (that is to say) the determination without an administration of the estate of any of the following questions or matters:—

(1) any question affecting the rights or interests of the person claiming to be the creditor, next-of-kin or heir-at-law,

(2) the approval of any sale, purchase, compromise or other transaction (see Order 55, rule 3).

13. The object of the proposals contained in the Limited Owners Bill is to bring the case before the court before the transaction is entered into, compel full disclosure at the time of the existing circumstances and thus to obtain the sanction of the court upon materials the record of which will remain. The object of the action for perpetuation of testimony is to preserve evidence in cases in which a suit cannot be instituted at once. These suggestions seem very reasonable, but we think that they are open to serious objections and that they would tend to much litigation as to whether or not the evidence led before the court on the originating summons had been fully and fairly disclosed and as to

whether the evidence that had been preserved was reliable or perjured. Moreover, considering the number of such alienations that take place grave risk would be incurred of flooding the courts with extra work. Every alienee would probably feel obliged to have recourse to these means of safeguarding his title. If he did not do so, an inference would inevitably be drawn against him. After all, the great majority of such alienations do not come at present before the courts for one reason or another.

14. For these reasons we recommend, as the best way of dealing with this highly important question, that the right of the ultimate reversioner to treat the date of the widow's death, *i.e.*, the opening of the succession as giving a new start to a period of limitation and as the date of the accrual of a new cause of action for questioning the propriety of the alienation or court sale should no longer be absolute. We think that it would be both possible and reasonable to revise the law of limitation in these cases and to introduce provisions of the same character as those which are to found in the Punjab Limitation Act (I of 1900) and Punjab Act I of 1920. In the Punjab few owners of land have unlimited rights of disposition under the Customary Law. This, in the past, gave rise to suits brought long after alienations had been made by limited male owners to have the alienations declared void in the interests of some heir of the male owner. It may be that in the Punjab the right of the ultimate reversioner under the Customary Law is not so uncertain as is usually the case during the lifetime of a Hindu woman. The principle, however, is that, if within a certain number of years during which the identity of the person who will ultimately enjoy the reversion cannot be ascertained, the alienation is not attacked by anyone of the persons then existing and having the right to sue for a declaration that the alienation does not bind the reversion, then the ultimate reversioner should take the estate as he finds it. The period prescribed in the Punjab has recently been shortened from twelve years to six years. The suggestion of Sadasiva Ayyar, J., above referred to is a period of twenty-four years. In our opinion for this purpose the best period would be twelve years. We proceed to state the position of the law as we would like to see it.

15. In the first place, the application of article 120 and its reference to " the accrual of the cause of action " to declaratory suits brought by a reversioner other than the presumptive reversioner was never intended by anyone and should be definitely negatived. It should be enacted that all declaratory suits brought by any reversioner during the lifetime of the limited owner for a declaration that the latter's alienation does not bind the reversion are representative suits in the full sense of the term. The result of any such suit should bind both the alienee and all reversioners except of course when set aside in appropriate proceedings as having been obtained by fraud or collusion. For this purpose Order I, rule 8, Civil Procedure Code, with any necessary adaptation or amendment should be applied compulsorily to all such

suits. The circumstances under which it is open to a reversioner other than the nearest reversioner to maintain such a suit may very well be left as at present. This being premised, we would allow a period of twelve years from the alienation within which any reversioner entitled to bring such a suit might institute the same. In the case, however, of any reversioner not in existence at the time of the alienation we would permit no extension of this period of twelve years, whereas to a reversioner in existence at the date of the alienation we would allow those provisions of the Limitation Act to take effect which extend the period of Limitation in favour of minors and others. This would, we think, provide a reasonable law of limitation so far as regards declaratory suits. Indeed it is, as we understand, almost exactly the position of the present law in the view of a Full Bench of the Madras High Court as explained in the decision already referred to. Whether it be exactly in conformity with the present law or not, it must be observed that any view which applies Article 120 to these cases renders abortive and nugatory the provisions of the Limitation Act as regards declaratory suits by reversioners, and leaves it quite possible for such a suit to be brought a hundred years after the alienation.

An alienee taking from a limited owner can hardly expect that his transfer should have any chance to be held binding on the reversion unless (1) possession is given to him at or about the time or (2) transfer is effected by a registered instrument with or without an entry being made in the revenue or other mutation records. In all cases where the transfer is made by a registered instrument or by an entry in the revenue records or in which possession is given to the alienee, we would restrict the right of the ultimate reversioner after the succession has opened to him to maintain a suit for recovery of the property to twelve years from the date of registration or mutation or delivery of possession, unless within that period a declaration has been obtained by some reversioner in the mean time. To this provision, however, we would make an exception providing that where the ultimate reversioner was, at the moment before the succession opened, entitled under the foregoing provisions to bring a declaratory suit by reason of minority or otherwise he should be allowed after the opening of the succession to bring his suit within three years after attaining majority or after other disability had ceased. Where in a suit by any reversioner a declaration has been obtained to the effect that the alienation does not bind the reversion the ultimate reversioner might still be allowed twelve years from the death of the limited owner in which to sue for *possession*. We put this forward not as a draft but as the outline of a proposal which seems to us to give as great a measure of protection as any law can give or should try to give to persons who succeed to an estate which entitles them to challenge transactions made by a limited owner at a date when they themselves, if in existence, had a mere *spes successionis*. " It seems to me," " said Sadasiva Ayyar, J." that it is a glaring anomaly " that while an alienee from a mortgagee or even a

trustee is protected after twelve years from the date of the alienation under Article 134, while an alienee even from a minor's guardian is protected after three years from the date of the minor's attaining majority under Article 44, when even a son supposed to have equal rights with his father in the ancestral property if he is born after an alienation by his father cannot acquire by birth any right to attack that alienation, a reversioner with a *spes successionis* and not born till several years after an alienation by a female heir should have twelve years from the date of the death of the Hindu female heir (who has certainly greater rights of ownership than a guardian or a trustee) to sue for possession of a property alienated by her, say more than sixty years before her death."

16. While dealing with this subject we cannot ignore the fact that many of the suits to set aside alienations effected by limited owners under the Hindu Law are due to the uncertainty surrounding the interpretation of the term " necessity " for which alone such limited owner can alienate properties. The earliest leading case dealing with this question was one relating to the manager of an infant's estate, and the ambit of his powers of alienation of his ward's estate which was indicated therein has been applied in subsequent cases to alienations by other limited owners. The Privy Council observed in that case that the guardian could alienate not only for what is now termed " necessity " but also for " the benefit of the estate." In later cases, however, this second consideration, has been relegated to a subordinate position, if not completely overlooked, and courts have gone so far as to hold that unless there was some pressure on the estate the limited owner will not be entitled to alienate, even if there was an obvious benefit by the discharge of debts actually payable by the estate. This has opened the door to all sorts of subtle contentions as to whether in the particular circumstances of the case there was pressure or not, and the consequent flood of oral evidence. This narrow interpretation of a limited owner's powers obviously leads to positive injustice and is at the present day unsuited to the conditions of Hindu society. For example, suppose a Hindu widow is left in possession of land, which yields at the time of the death of her husband Rs. 200 a year and later by some rise in value becomes worth a lakh of rupees, it will be obviously to the beuefit of both the widow and the reversioners that she should be able to convey the land for one lakh of rupees and invest it in such securities as will give her ordinarily a monthly income of four to five hundred rupees. As the law at present stands, she has apparently no power to do this. We think the law should be so restored or changed as to permit of alienations, which, though not strictly necessary for the preservation of the estate, would be distinctly beneficial to it.

CHAPTER 41.

Limitation.

In response to our question " In what cases do you consider that the law of Limitation might be made more stringent," a large number of suggestions have been made in every province for the deletion or amendment of various sections and articles of the first schedule of the Limitation Act (IX of 1908). A complete revision of the Act involves more labour than we have opportunity to bestow, and we confine ourselves to certain matters as to which we are prepared to make recommendations with a view to curtail the number of stale claims or the number of unnecessary suits. We have dealt with Articles 125, 141, and 182 in other chapters.

2. It has been suggested to us that section 5 of the Limitation Act should be altogether deleted as in practice there prevails considerable laxity in the use of its provisions. It is also for consideration whether an appeal should be allowed to the High Court against orders under this section passed by lower appellate courts. We are not sufficiently impressed with the volume of unnecessary applications under section 5, or appeals against orders passed under that section as to make us recommend any change in the law.

3. The next suggestion relates to the amendment of section 14. The Privy Council in Nrityamoni Dassi *v.* Lakhan Chandra Sen (I. L. R. 43, Calcutta, 660), affirming the decision of the Calcutta High Court in Lakhan Chunder Sen *v.* Madhusudan Sen (I. L. R. 35, Calcutta, 209), allowed a plaintiff to exclude the time occupied by him in litigating a former suit in which he was a defendant and not a plaintiff. It was a suit for partition in which the defendant has the same interest as the plaintiff in the matter of division of the joint property. There appears to be no reason why in all cases a defendant should be driven to a separate suit, while his rights are in the usual course of things likely to be adjudicated upon in a pending suit to which he is a party. For the purpose of this section, Explanation 2 provides that a plaintiff or an applicant *resisting* an appeal shall be deemed to be *prosecuting* a proceeding. On the same analogy section 14, clause 1 may be so framed as to permit of the exclusion of time in favour not only of the plaintiff who has been prosecuting but also of the defendant who has been resisting with due diligence another civil proceeding according to the principle of the decision of the Privy Council case above referred to. The expression " Where the proceeding is founded upon same cause of action " seems too narrow to afford substantial relief, and for it may be substituted the words " where the matter in issue is the same" (as in section 11 of the Civil Procedure Code) or other words of more general import.

4. Various proposals were made before us with reference to sections 19, 20 and 21 of the Act. Clause 2 of section 19 runs as follows:—

"Where the writing containing the acknowledgment is undated oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872, oral evidence of its contents shall not be received." This is a fruitful source of false pleas and we think that the date is so essentially a part of the acknowledgment itself, that unless it is in writing like the rest of the acknowledgment it should not operate to save the bar of limitation. We would therefore suggest that this amendment should be made.

5. With regard to section 20, we think that the provisions of clause (1) as they stand lead to a number of frivolous suits long after the period of limitation prescribed. It is easy in the first place for the plaintiff to say that within the time fixed the defendant paid him one rupee and two rupees as interest. He attempts to prove such payment by adducing oral evidence which takes up much valuable time, but ultimately the suit is, in most cases, dismissed. There is no reason why the payment of interest should stand on a different footing from the *part payment of the principal* of a debt. In the latter case the proviso to clause 1 enacts that the fact of payment should appear in the hand-writing of the person making the same. It seems to us that the payment of interest should also be subject to the same conditions as the part payment of principal. There does not seem to be any reason for providing for payment of interest *as such* so long as any portion of the sum paid can be appropriated for that interest. Moreover, having in view our recommendation that the payment of interest should be also in writing, the words "as such" would lose much of their importance.

6. It will save considerable unnecessary litigation and prevent vexatious pleas if "limited owners under the Hindu Law" and also the *karta* or manager of a joint Hindu family are enabled to make acknowledgments and make payments so as to attract the provisions of sections 19 and 20. Conflicting views are held with reference to the power of a widow to make an acknowledgment binding any interest except her own. A limited owner like a Hindu widow fully represents the estate for many purposes; a judgment properly obtained against her will constitute the subject matter of the suit *res judicata* in a suit by the ultimate reversioner. There appears to be no reason why in the normal course of her administration of the estate of the last male owner she should not have authority to acknowledge a debt. The matter may be made clear.

7. Article 5 of the first schedule provides a period of six months for a suit under the summary procedure referred to in section 128, clause 2 (*f*) from when the debt or liquidated demand becomes payable or when the property becomes recoverable. As the article stood before amendment it referred only to suits on negotiable in-

struments under Chapter 39 of the old Code of Civil Procedure (Summary Procedure). When a change was made in the Code of 1908 giving powers to High Courts to extend the summary procedure under section 128, clause 2 (*f*), that section was substituted for Chapter 39, Civil Procedure Code in Article 5. In making the change, however, the fact that the old chapter was also retained as Order 37 of the new Code of Civil Procedure seems to have been overlooked. As it stands, Article 5 is now worded so as, strictly construed, to apply only to suits affected by rules framed under section 128, clause 2 (*f*) and not to suits under Order 37. It is highly doubtful whether this was intended. If so, instead of the period of six months applicable to suits under that chapter under the old Code the period must now be at least three years under the general article for recovery of money lent (Article 57). Article 5 has, however, been applied to suits under Order 37 and that seems to be a widely held opinion, though there is high authority for the opposite opinion. There can be no doubt that the period of six months is much too short. In 1921 and 1922 a great deal of injustice was caused and the courts at Delhi and Bombay in particular were rendered powerless to cope with idle defences by acceptors of bills of exchange purely by reason of the six months limit being applied to Order 37. We have dealt with this matter in our chapter on the Original Side of High Courts and in dealing with commercial suits in the mofussil. Some of our witnesses considered that if a person desires to take advantage of the summary procedure he should be himself diligent and come into court as early as possible. Accordingly they considered that a period of one year would meet the requirements of the situation and would not unduly interfere with the policy which originally fixed the period for such suits only as six months. In our opinion there is no real necessity to have a special period of limitation for what is called " summary procedure." If once it is decided that the conditions of a province or portion of a province are such as to enable rules to be framed for the extension of this procedure, there is no justification for curtailing the ordinary period of limitation so as to prevent people from taking advantage of the quicker method of securing relief provided by the rules. There is very special objection to a short period in suits on negotiable instruments notwithstanding that the six months limit was adopted when in 1855 summary procedure was applied to all the courts in England by the Statute 19 Vic., c. 67. We think, however, that this matter would be reasonably dealt with if in all cases for which summary procedure is provided under section 128 (*2*) (*f*) and Order 37 of the Code the period were fixed at *three* years.

8. Article 47 prescribes a period of three years from the date of the final order in the case, within which a suit should be instituted by any person bound by an order respecting the possession of immovable property made under the Code of Criminal Procedure, 1898, or the Mamlatdars' Courts Act, 1906, or by any one claiming under such person to recover the property comprised in such

order. The effect of an order under section 145 of the Criminal Procedure Code declaring one of the parties to be in possession is that the unsuccessful party's title is extinguished unless he brings a suit within three years. Proceedings started to attack the validity of such an order are analogous to those provided for by Articles 11 and 11 (*a*), which prescribe the period of one year from the date of the orders under Order 21, rules 63 and 103. It appears to us that a similar period would be ample in a case covered by Article 47 also. The sooner such suits are tried by a court the better for the parties as well as for the court.

9. Article 85 provides a period of three years for a suit for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties, and time begins to run from the close of the year in which the last item admitted or proved is entered in the account, such year to be computed as in the account. The plea of limitation under this article is a common one in suits by shopkeepers against their customers. One item of account proved to exist within three years by the bringing of a suit will not draw after it other items of more than three years' standing so as to prevent a bar of limitation *unless there were mutual accounts and reciprocal demands between the parties.* Controversy has raged round the meaning of the phrases " mutual, open and current account " and " reciprocal demands." It is in each case difficult to decide what exactly is the test which will make the account fall within the meaning of this article. We think that something should be done to formulate a uniform test which will at once be clear and certain, even though it will have the effect of prolonging the period of limitation. Even if it does that, it will be less unsatisfactory than the present state of affairs.

10. Articles 92, 93, 95, and 96 provide for a period of three years which, in our opinion, seems to be unduly long, as in all these cases the points in issue have to be decided mostly on oral evidence. It is desirable in the interests of the parties as well as the court that such suits should be heard as soon as possible after the cause of action arises and we accordingly recommend that the three years period may be curtailed to one year. For example, Article 92 deals with a suit to declare the forgery of an instrument issued or registered. This is really the civil counter-part of a prosecution for forgery. If a prosecution for forgery is instituted three years after the facts were known, the difficulty of proving the charge has only to be stated in order to be appreciated. Similar considerations should also apply to a civil suit. Moreover, suits to which Articles 92 and 93 apply relate merely to declaration, and the omission to sue for a declaration within the period prescribed does not bar the plaintiff of his substantive rights. If such a declaration is wanted by a party, he should be diligent in securing it. As regards a suit under Article 95 which is to set aside a decree obtained by fraud or for any other relief on the ground of fraud, there appears to be no reason to allow a man to wait for three years after the fraud becomes

known to him. It need hardly be added that in very few cases fraud can be proved by prepronderating documentary evidence. Similar considerations will apply to Article 96 which relates to suits founded on mistake. In these cases the cause of action is when the fraud or mistake becomes known to the party wronged or the plaintiff.

11. Article 109 provides a period of three years for a suit for profits of immoveable property belonging to the plaintiff which has been wrongfully received by the defendant and time begins to run from when the profits are received. Difficulty is experienced in some cases, *e.g.*, when salt is rightly gathered and afterwards wrongfully appropriated from salt pans, as to the determination of the date " when the profits are *received.*" We think that the third column should be so amended as to make it clear that the starting point in such cases is the date of the wrongdoer's *appropriation* of the profits as his own.

12. Article 113 prescribes, for a suit for specific performance of a contract, a period of three years from the date fixed for performance or if no such date is fixed when the plaintiff has notice that performance is refused. Suggestions have been made to us that the period prescribed is too long. We are certainly of opinion that suits for specific performance are sometimes entertained in India though brought after undue delay. This article, however, is of very great importance having regard to the requirements of Indian Law which make certain transfers valid only when effected by a registered instrument. The discussion in Chapter 35 of this report of the doctrine of part performance may be here referred to as showing the fundamental importance of this article. In Bengal, and possibly elsewhere, some decisions reflect a tendency to regard the law of Limitation as modifying the discretionary nature of specific relief. The view taken appears to be that the Indian Limitation Law is in general very strict and that if a party sues within the three years for specific relief he ought to be given it unless the defendant can show that he has changed his position in consequence of delay, has acted on the assumption that the plaintiff would not require specific performance or can show otherwise that in addition to the delay and because of it there is a special and particular reason in the circumstances of the individual case why waiver or acquiescence should be imputed to the plaintiff or why specific relief should be refused. In other words, the position is really this, that the law gives to a plaintiff three years from a certain time in which to bring his suit and that if he comes within the three years special reason is necessary to deprive him of his right. This doctrine appears to be applied uncritically to all forms of specific relief and to the specific performance of very different types of contracts. In an old case before the Privy Council in which the judgment was delivered by Sir Barnes Peacock [Lindsay Petroleum Co., *v.* Hurd 1873 5, P. C., 221], the plaintiffs were a company seeking to have a purchase of land made by them set aside as having been

induced by fraud. There had been some lack of diligence in bringing the suit but not a great deal. The defendants having a thoroughly unmeritorious case attempted to resist a decree that the transfer should be set aside by exaggerating the importance of delay. Sir Barnes Peacock in dealing with this plea observed as follows:—

> "Where it would be practically unjust to give a remedy either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted; in either of these cases, lapse of time and delay are most material. But in any case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable."

This case and others have been regarded as authority for the following propositions which we take from the judgment in a purchaser's suit for specific performance of a contract to sell a house and premises situate in Clive Street, Calcutta [Kissen Gopal Sadaney, *v.* Kally Prosonno Sett, 33, C. 633].

"I am speaking of the case, where a defendant does not contend that the plaintiff has given up his rights, or does not contend that he has been prejudiced by the belief that the plaintiff has foregone his rights; but of the case where the defendant simply says:—'The plaintiff has been slow to come to the court. I have nothing more to say against his claim which, however, should be dismissed for this delay, although his suit is brought within the period of three years allowed by the Limitation Act.' "

"There may be some decisions which appear to warrant such a view. But on the whole the tendency of the courts is to discourage the plea of *laches*, unless somebody has been damnified by it; and, as in this country, the period of limitation enacted by the statute is generally very short, there is the less need for the application of the equitable doctrine relating to delay."

"In my opinion delay is not material so long as matters remain *in statu quo*, and it does not mislead the defendant or amount to acquiescence. It must be shown that delay has prejudiced the defendant. To operate as a bar to relief the delay should be such as to amount to a waiver of the plaintiff's right by acquiescence, or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted. When such is not the case, any lapse of time, short of the period allowed, under the Limi-

tation Act should not disentitle the claimant to relief, to which he is otherwise entitled."

We understand that in other High Courts the observations made in the case last cited are not always regarded as correct. We appreciate that the language used by equity judges a hundred years ago as regards the special character of equitable remedies and the peculiar jurisdiction of the Court of Chancery have lost a great deal of their force. We appreciate further that the administration of equity in the time of Sir George Jessel tended largely to modify the discretionary character of equitable relief so as to make it more certain in its operation. In modern times a judicial discretion does not sit loose to principle. Even in suits by a purchaser upon an open contract for the sale of land one would probably not be prepared now to say, with Romilly M. R., that a plaintiff must show himself " ready, prompt and eager." There is, however, a danger that the reaction should be over-done. This is to be noticed in text books of very great utility and of high authority. During the years following upon the War land values in presidency towns and elsewhere rose to great heights. In or about 1921 they fell. At various times speculation in land was rampant and prices of land rose and fell. When in these conditions principles of law are applied to the effect that a purchaser has three years in which to stand by without forfeiting *primâ facie* his right to compel specific performance of his contract unless the defendant can show acquiescence or that he acted reasonably upon the assumption that he would not be held to the contract, or other special reason, the law of specific performance departs from its original character and exceeds the limits within which alone it is reasonable. A purchaser under an open contract is, as has often been observed, in a highly advantegeous position being able, as a rule, to take exception in the last resort to the title. Again, in such a suit when brought against a party who has taken subsequently to the contract from the vendor, the defendant is put in the position of having to prove that he is a *bonâ fide* purchaser for value without notice. So long as it is thoroughly understood by very one concerned that except in special circumstances a plaintiff who is not reasonably prompt and diligent in suing for specific performance will be relegated to a remedy in damages, the law of specific performance will operate reasonably. It is not the function of the law of Limitation to affect in the least degree the discretionary nature of the remedy. Its sole function is to provide in the interests of certainty and of repose a limit of time beyond which neither the greatest hardship nor the most special circumstances shall be permitted to induce a court to grant this form of remedy. We think that in these circumstances the form of Article 113 as it stands should not be altered. It is true that courts have liberally applied its language with the result that a plaintiff who has abstained from making a demand for specific performance may escape the provisions of the Article even after 20 years, the time running only in certain

cases from the defendant's refusal. But we are not prepared to suggest that this should in principle be changed as there are cases in which this principle is reasonable enough. Where a time for performance has been fixed we think that the period of three years might be reduced to two and in other cases to one year from the date when the plaintiff has notice of refusal. No juggling with Limitation will, however, affect the matter much. The remedy is and should remain discretionary. Limitation is a principle which in extreme cases removes the discretion. It is not a principle by reference to which the discretion has to be exercised.

13. Article 128 provides a period of 12 years for a suit by a Hindu for arrears of maintenance from the time when the arrears are payable. In cases where the maintenance is a fixed amount, there is little difficulty in giving effect to this long period of limitation. Where, however, the amount has not been fixed, but has to be ascertained with reference to various circumstances such as the receipts and expenditure of the family during a series of years, the matter has to be determined almost entirely by oral evidence. It is well known that accounts are not ordinarily kept in joint-Hindu families, unless they are traders or there are other special reasons for maintaining accounts. The result is that perjured testimony and often spurious accounts are produced in support of the rival contentions advanced in such cases. The evil will be greatly minimised if in all cases where the amount has not been fixed, the arrears should be claimable only for a period of three years, the Article being left as it is with reference to cases where the rate or amount of maintenance is fixed.

14. Article 132 prescribes a period of twelve years for enforcing payment of money charged upon immovable property from the date when the money sued for becomes due. This period of limitation has not been applied by some judges to cases in which not *money* specifically, but something which can be valued in money such as grain, is charged on the immovable property. Not infrequently in Hindu families maintenance is allotted to female members in the shape of grain from a particular parcel of land and the maintenance is charged on that land. Money lending cases are not uncommon in which money is repayable in grain and the obligation is charged upon property described in the instrument. There has been difference of opinion whether Article 132 applies to these cases and after some conflict of opinion, it has now been held in Calcutta that a suit to recover the value of paddy charged upon immovable property comes within Article 132. See Ramchand Sur *v.* Iswarchandra Giri (25, Calcutta Weekly Notes, p. 57 F. B.). The matter is one which should be made clear by the amendment of the statute itself.

15. Article 166. There is a difference of opinion as to whether this article which deals with a petition to set aside a sale in execution of a decree applies when the petition is by a judgment-debtor under section 47 of the Civil Procedure Code. It is sometimes

contended that that article applies only to a petition under Order XXI, rule 90 alone. It will be better if the matter is made clear by adding words " including a petition under section 47 of Civil Procedure Code " in the first column.

16. It appears to us that recent decisions have shown the necessity of a revision of Articles 133 and 134. In particular the alienation of property vested in the head of a religious institution raises special problems for limitation purposes and should be specifically provided for.

CHAPTER 42.

Evidence.

1. *Sections 11, 13, 32 and 157 of the Indian Evidence Act.*— Recitals in a document executed by a person giving the boundaries of his immovable property furnish valuable evidence when the issue as to the ownership of the tenements described as such boundaries arises. Faced by conflicting oral testimony courts till recently treated these recitals made *ante litem motem* as valuable factors in testing the veracity of witnesses. Such evidence is now held not to be relevant. The Madras High Court in Sarapalli Venkatarajagopalaraju *v.* Hota Narasayya 1914. M. W. N., 779, has held such evidence to be inadmissible: See also Abdullah *v.* Kunj Behary Lal, 16 C. W. N., 252. There is danger no doubt in accepting such recitals as conclusive evidence; the weight to be attached to them must depend on the circumstances of each case. While such evidence cannot be conclusive nor sufficient by itself to prove the ownership of the " boundary " property, it should not be treated as wholly *irrelevant* and whatever its weight, it should not be overlooked. Witnesses examined but occupy the time of courts while they do not help them in reaching the truth in the same way as recitals in documents executed long before any dispute arose relating to the immovable property which is the subject matter in issue. Receipts of this kind are in some circumstances admissible as evidence under sections 13 and 32, the court in each case being allowed to determine their weight (*c.f.*, Ningawa *v.* Bharamappa, I. L. R. 23, Bombay, 63). Such recitals cannot be inferior in probative value to those admitted under section 157 as former statements of witnesses for purposes of corroboration. Yet these recitals are not admissible under that section unless made at or about the time when the property described in the recitals was acquired, or " at or about the time when the fact took place or before any authority legally competent to investigate the fact." It appears therefore necessary to provide that recitals of this kind are relevant. We recommend that the law should be changed accordingly.

2. Section 35 relates to the relevancy of any entry in the public record made in the performance of a duty. In a decision reported in Tripurna Seethapati Rao Dora *v.* Rokkam Venkanna Dora (I. L.R. 45, Madras, 332), the Madras High Court held that the summary of pleadings given in a judgment is not relevant evidence as to the contents of those pleadings. The pleadings in old suits are often not available and the only evidence available to prove their contents is not infrequently the recitals thereof in the judgments in such suits. Such recitals are entries in public records relating to a fact-in-issue or a relevant fact, and made by a public servant in the discharge of his official duty. Rule 4 of Order XX of the Code of

Civil Procedure requires a concise statement of the case to be given in the judgment and this usually takes the form of a summary of the pleadings. It is difficult to see why such recitals cannot be treated as coming within the purview of section 35. Even if they are not covered by section 35 as it stands, it should be made to embrace them. Otherwise valuable evidence of a reliable character will be lost, letting open the door for perjured testimony. The possibility of the summary being not altogether accurate affects its weight and not its admissibility.

3. Under section 44 of the Evidence Act a party may show that any judgment relevant under sections 40, 41 and 42 was delivered *by a court not competent to deliver* it or was obtained by fraud or collusion. At one time it was held that consent gave no jurisdiction in any case. A party to a judgment could show in a collateral proceeding that it was not binding on him on the ground of want of jurisdiction even if he had not appealed against it. But according to section 21 of the Code of Civil Procedure, an objection as to jurisdiction relating to the place where the suit is instituted is not allowed to be taken in any court of appellate or revisional jurisdiction, unless the same was urged duly in the court of first instance at the earliest possible opportunity, and in all cases where issues are settled at or before such settlement, unless there has been a consequent failure of justice. Under section 44 as it stands, this objection can be taken in a collateral proceeding and the judgment can be objected to. This is anomalous. Under the Court Fees Act of 1870 " every question relating to valuation for the purpose of determining the amount of any fee on a plaint or memorandum of appeal shall be decided by the court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit," and an appellate court can deal with such a dispute only if it has been decided wrongly *to the detriment of the revenue.* An objection by reason of the over-valuation or under-valuation of a suit or appeal in a court of first instance or in a lower appellate court which had not jurisdiction with respect thereto shall not be entertained by an appellate court unless (*a*) the objection was taken in the court of first instance at or before the hearing at which issues were first framed and recorded; or in the lower appellate court in the memorandum of appeal to that court, or (*b*) the appellate court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued, *and that the over-valuation or under-valuation* thereof *has prejudicially affected the disposal of the suit or appeal on its merits* (section 11 of the Suits Valuation Act). Mere non-competency, even if there is an error as to pecuniary jurisdiction, is not thus a ground for vacating a decree on appeal. There is therefore no point in a person being allowed to object to a judgment being proved against him on the ground of want of pecuniary or territorial jurisdiction, where he had not taken such objection in the proceedings in which the judgment was passed or in appeal therefrom. The use of such judgments is calculated to prevent frivolous defences being taken, ignoring the

judgment of a court otherwise competent. It should not be left to a litigant to lie by quietly when a judgment is passed against him, and ignore it on the ground that the court which passed it had no pecuniary or territorial jurisdiction. The recommendation we make leaves unaffected other grounds of want of competency of the tribunal which passed such a judgment. We recommend that section 44 should be so modified as to enable courts to admit in evidence judgments if not reversed or set aside, even though the court that passed them had no territorial or pecuniary jurisdiction to do so.

4. We think that secondary evidence should be allowed to be given under section 65 in some cases not specified therein.

When copies of registered documents have to be used in evidence objection is taken that the original ought to be called for and the person in possession of the original has to be summoned. This objection is taken simply to prolong the trial for ulterior purposes and not because there is the slightest intention of attacking the genuineness of the original. Great formalities attend the registration of documents and care is bestowed on the preparation of certified copies in the Registration department. A registration copy is, ordinarily, in no worse position than that of a public record kept in British India of a private document which is also a public document within section 74 of the Evidence Act, and of which according to section 65, clause (*c*), a certified copy would be good evidence. We would therefore suggest that after clause (*g*) a new clause may be added, *viz.*, " where the original document has been registered according to the law of registration in force in British India."

5. According to section 68, if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence. Insistence on this provision has led to serious delay and injustice in the case of mortgages in several parts of India, especially after the decision in Samu Pattar's case (I. L. R. 35, Mad. 607), to which we have referred in Chapter 39. To combat that evil we have therein suggested an alteration in the definition of the term " attest." That alteration will however not sufficiently prevent the delay caused in demanding formal proof by the examination of an attesting witness which has to be done even if the defendant does not contest. The courts have often to wait for such formal proof of these documents. The object of this provision is obviously to ensure proper proof of execution. In the case of registered documents, there is *primâ facie* proof of such execution, and there is therefore not the same necessity for calling an attesting witness as in the case of unregistered instruments. We therefore suggest that the court should have power in the case of non-testamentary registered instruments to dispense with this special requirement of section 68, unless the execution or attestation is expressly denied. In the case

of suits, execution or attestation should not be deemed to be expressly denied unless it is specifically denied in the pleadings and an issue has been framed thereon.

6. According to section 74 (*2*) public records kept in British India of private documents are considered to be public documents for purposes of proof. There has been difference of opinion as to whether plaints and written statements are such records, and doubt as to whether petitions and affidavits filed in the course of the progress of a suit are public documents. Inconvenience is felt in sending for the originals of these documents, and when the originals are sent for, they in most cases serve no better purpose than the certified copies. We would therefore suggest that it should be made clear that all pleadings and proceedings filed by *either* party, including affidavits, should be deemed to be public documents within section 74. In a proper case, those who attack the genuineness of the original will not be prevented from doing so by this provision. On the other hand, proceedings will not be hung up for want of the original which may not be forthcoming for many weeks and months owing to various reasons unnecessary to detail here.

7. According to clause (*5*) of section 78 the *proceedings* of a *municipal body* in British India can be proved by a certified copy of such proceedings. Having regard to the improved organisation of *all* local bodies including local boards, we think that their proceedings and house-tax and other registers and accounts, all maintained under the provisions of various local enactments and rules framed under them, should be allowed to be proved by certified copies. Such books have often to be summoned and entries in them exhibited. The inconvenience caused to all local bodies in the removal from their office of registers and accounts is often great. Several courts summon them simultaneously and one or another has to wait. As stated above, the offices of these bodies have to be conducted at present with as much regularity and care as Government offices; and it seems to us therefore that there is no danger in the change advocated.

8. The Privy Council observed in " Gangamoyi *v.* Triluckhyanath Chowdhry " (I. L. R. 33, Calcutta 537),—the case of a will the execution of which was disputed—" The registration is a solemn act, to be performed in the presence of a competent official appointed to act as registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present, are competent to act, and are identified to his satisfaction, and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order. Of course it *may* be shown that a deliberate fraud upon him has been successfully committed; but this can only be by very much stronger evidence than is forthcoming here." We think that it is time to prevent the delay caused by requiring formal proof of duly registered documents, and to give effect to the statement of the Privy Council above quoted concerning the effect of registration by embodying it in a statute. We therefore suggest that after section 85,

the following should be added as a separate section. "The court may presume that a document registered under the law of registration in force at the time of its registration was executed by the person by whom it purports to be executed, and that he was competent to act, and that all things done before the registrar in his official capacity and verified by his signature were done duly and in order." A large number of witnesses examined before us have suggested that there should be no proof required at all of any registered document and we think that the rule that we have suggested will satisfy that demand.

CHAPTER 43.

Champerty.

1. In Halsbury's Laws of England, Volume I, pages 51-53, maintenance and champerty are defined as follows:—Maintenance is defined as " Giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognised by the law as justifying his interference." Champerty is defined as " A particular kind of maintenance, namely, maintenance of an action in consideration of a promise to give to the maintainer a share in the subject matter or proceeds thereof."

2. Champerty and maintenance are illegal under the law of England, and, although the provisions in restraint have been considerably modified in practice, the prohibition exists. In India there is no prohibition against champerty as such.

3. From an early period in the administration of justice by British courts in India, champerty was discovered to be rife and to approach a scandal. The following remarks of Mr. Justice Phear made about 1869 refer to an instance of champerty that had arisen in a suit. " This case unfortunately is of no exceptional character. It is but a type of what goes on daily. In every court of civil justice throughout Bengal speculative traffic in law proceedings has assumed the dimensions and respectability of a regular trade. A large class in the community fattens and grows rich on the spoils of needy suitors. Litigation is promoted and maintained without reference to the wishes or interests of the nominal parties. As often as not, in cases where proprietary interests are in contest, the names on the records represent puppets which move at the bidding of persons who are in no way before the courts. The proceedings are carried on not to adjust the rights of suitors seeking equity and justice, but in order that contingencies may be determined according to which the successful player in a great game of speculation will draw the stakes. I feel it impossible to exaggerate the magnitude of the evil." (Ghose *v.* Amirtamayi Dasi, 4 B. L. R., 1, pp. 12 and 13.)

4. Between 1825 and 1876 there are many reported cases dealing with champertous claims but it is not necessary to refer to them as their substance is stated in the decision of the Judicial Committee of the Privy Council in I. L. R. 2, Cal. 233. Ram Coomar Coondoo *v.* Chunder Canto Mookerjee, of 25th November 1876. This is the leading case on the subject of champerty in British India. Their Lordships said at pp. 254-57:—

" It will now be convenient to refer to two cases before this Committee in which the subject has been to some extent considered. In Fischer *v.* Kamala Naicker,[1] the court below having held an

[1] 8 M. I. A. 170.

agreement to be void for champerty, this tribunal thought the judgment to be wrong on the grounds that the point had not been raised by the pleadings and also that the agreement was in no sense champertous, and, this being so, their Lordships observed; 'It was unnecessary to decide whether under the law which the court was administering these acts which in the English law are denominated either maintenance or champerty, and are punishable as offences, partly by the Common Law and partly by statute, are forbidden.' But in the course of the judgment they made the following observations: 'The Court seem very properly to have considered that the champerty, or more properly the maintenance, into which they were enquiring was something which must have the qualities attributed to champerty or maintenance by English Law; it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive is in the same sense necessary.' It is unnecessary now to say whether the above considerations are essential ingredients to constitute the statutable offence of champerty in England, but they have been properly regarded in India as an authoritative guide to direct the judgment of the Court in determining the binding nature of such agreements there.

"In the more recent case before this tribunal, Chedambara Chetty *v.* Renga Krishna Muthu Vira Puchaiya Naickar,[1] in which a suit to enforce an unrighteous and champertous bond was dismissed, the following observations were made:—

> 'With respect to the law of champerty or maintenance, it must be admitted, and indeed it is admitted in many decided cases, that the law in India is not the same as it is in England. The Statute of Champerty being part of the Statute Law of England, has of course no effect in the mofussil of India; and the courts in India do admit the validity of many transactions of that nature, which would not be recognized or treated as valid by the courts of England. On the other hand the cases cited show that the Indian Courts will not sanction every description of maintenance. Probably the true principle is that stated by Sir Barnes Peacock in the course of the argument, *viz.*, that administering, as they are bound to administer, justice according to the broad principles of equity and good conscience, those courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families, and carried on from a corrupt and improper motive.'

[1] L. R. I. I. A. 241.

"The result of the authorities, then, appears to be that the English Laws of Maintenance and Champerty are not in force as specific laws in India; and the decisions to this effect appear to their Lordships to rest on sound principles. So far as concerns the mofussil, there is no ground on which it can be contended that these laws are in force there. The question has chiefly been whether they are in force in the presidency towns, although the distinction between the presidency towns and the mofussil has not been always borne in mind.

"It is to be observed that the English Statutes on the subject were passed in early times, mainly to prohibit high judicial officers and officers of State from oppressing the King's subjects by maintaining suits or purchasing rights in litigation. No doubt, by the Common Law also, it was an offence for these and other persons to act in this manner. Before the acquisition of India by the British Crown, these laws, so far as they may be understood to treat as a specific offence the mere purchase of a share of a property in suit in consideration of advances for carrying it on without more, had become in a great degree inapplicable to the altered state of society and of property. They were laws of a special character, directed against abuses prevalent, it may be, in England in early times, and had fallen into at least comparative desuetude. Unless, therefore, they were plainly appropriate to the condition of things in the presidency towns of India, it ought not to be held that they had been introduced there as specific laws upon the general introduction of British law. The principles on which the exclusion from India of special English laws rests are explained in the well-known judgment of The Mayor of Lyons *v.* the East India Company.[1] It appears to their Lordships that the condition of the presidency towns, inhabited by various races of people, and the legislative provision directing all matters of contract and dealing between party and party to be determined in the case of Mahommedans and Hindus by their own laws and usages respectively, or where only one of the parties is a Mahommedan or Hindu by the laws and usages of the defendant furnish reasons for holding that these special laws are inapplicable to the towns. There seems to have been always, to say the least, great doubt whether they were in force there, a circumstance to be taken into consideration in determining whether they really were part of the law introduced into them.

"It would be most undesirable that a difference should exist between the law of the towns and the mofussil on this point. Having regard to the frequent dealings between dwellers in the towns and those in the mofussil, and between native persons under different laws, it is evident that difficult questions would constantly arise as to which law should govern the case.

"But whilst their Lordships hold that the specific English Law of maintenance and champerty has not been introduced into

[1] Moore's P. C. C. 175.

India, it seems clear to them upon the authorities that contracts of this character ought under certain circumstances to be held to be invalid, as being against public policy. Some of the circumstances which would tend to render them so have been adverted to in the two judgments of this tribunal already cited.

"Their Lordships think it may properly be inferred from the decisions referred to, and especially those of this tribunal, that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner.

"But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the *bonâ fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy,—effect ought not to be given to them."

5. From the above statement of the law it will be seen that the maintenance of an action in consideration of a promise to give to the maintainer a share in the subject matter or proceeds thereof can seldom invalidate the action or afford any defence to the party against whom it is brought. If the action is founded on good ground it will not usually be considered a gambling transaction, whatever be the degree of speculation involved, and, if the suit be unrighteous, it will fail on the merits. In either alternative, it is necessary to examine the merits before decision of the plea. The party may proceed against the financier if the agreement be extortionate or unconscionable. This is not however a perceptible addition to the right of any party to any agreement.

6. These views have been upheld constantly since. There are reported instances in which such agreements have been altered substantially on the ground that they were unfair and unconscionable. In the case of Chunni Kuar *v* Rup Singh, I. L. R. 11, Allahabad, 57, a Bench consisting of Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell in 1888 refused to enforce the terms of a bond, by which a litigant had agreed to pay Rs. 25,000, in event of his success in a certain appeal on receipt of Rs. 3,700, with which to conduct it. The court, while refusing to enforce the terms of the bond as they stood, awarded to the plaintiff the amount which had actually been advanced with interest. The same litigant had subsequently executed a deed of sale of a portion of the property in suit, which was valued for the purpose of transfer at Rs. 50,000, on receipt of Rs. 8,500 with which to prosecute an appeal to the Judicial Committee in England. The Allahabad

High Court refused to give effect to this transfer, holding its terms to be contrary to public policy, and that the reward was excessive and unconscionable. In appeal, in 1893, their Lordships of the Judicial Committee upheld the decree of the Allahabad High Court (I. L. R. 15, Allahabad, 352). They did not decide the question whether the transfer was contrary to public policy, but accepted the finding that the reward was excessive and unconscionable. In 1893 in an appeal from Oudh (Kunwar Ram Lal *v.* Nil Kanth and others, Indian Appeals, Vol. 20, p. 112) their Lordships upheld a decree of the Court of the Judicial Commissioner, in which that court refused to give effect to an agreement under which a person bound himself to sell a nine-sixteenth share of certain property to a money lender on the condition that he would finance litigation for the recovery of the property. The money lender having financed the litigation with success had sued to enforce the agreement. The Court awarded the money lender Rs. 1,000 as compensation for the expenses legitimately incurred by him. Their Lordships of the Judicial Committee stated at p. 115, in their decision "The English Law of Champerty is not in force in India, and documents which set up agreements to share the subject of litigation if recovered, in consideration of supplying funds to carry it on, are not in themselves opposed to public policy; but such documents should be jealously scanned, and, when found extortionate and unconscionable, they are inequitable as against the party against whom relief is sought, and effect should not be given to them. The plaintiff in this suit was a money-lender, and was dealing with illiterate persons; he must have represented to them the likelihood and the necessity of extensive litigation—a representation unwarranted by the facts; further, the fee paid to the vakil, Bansi Lal, was most excessive, and disproportionate to any work likely to be done by him."

7. In the case of Achal Ram *v.* Kazim Husain Khan, I. L. R. XXVIII, Allahabad 271, which is quoted at length in another portion of this chapter, their Lordships of the Judicial Committee refused to go into the question as to the validity of an agreement by which a certain Ardawan Singh had sold property, of which he was not in possession, to a third party, mainly in consideration of the third party financing the expenses of the litigation. But it is to be observed that the question of the validity of this contract as between Ardawan Singh and that party was not before their Lordships, for Ardawan Singh was no party to the appeal which was between the financier and the trespasser in possession.

In a recent case which came before the Judicial Committee from the High Court of Madras (1924) (Madras Weekly Notes, 607, Venkata Subhadraymma *v.* Venkatapati Raju) it is again laid down at p. 621 "In India, of course, champerty or maintenance is not illegal."

8. The law is clear. In our opinion, however, its provisions do not go far enough to remedy the evils which arise from cham-

pertous litigation. We have already referred to the remarks of Mr. Justice Phear. Nearly twenty years afterwards Sir John Edge stated in I. L. R. 11, All. 57 at pp. 72-73 (Chunni Kuar *v.* Rup Singh) " Gambling in litigation and what are called in England maintenance and champerty are unfortunately only too common in this country. The abuses which in 1869, Phear, J., in his judgment in Ghose *v.* Amirtamayi Dasi* stated to exist in every court of civil justice throughout Bengal, unfortunately exist at the present day in these provinces."

We are satisfied that the evils have not diminished since Sir John Edge made this pronouncement.

9. Transactions of this nature are at best speculations in litigation, which merge almost imperceptibly into pure gambling. At their worst they are even more objectionable. We cannot estimate the full extent of the evil. It has not been possible in the time at our disposal to extract from witnesses or collect from Local Governments and High Courts any thing like sufficient information on this point. A full enquiry to ascertain only the extent to which such practice prevails in the whole of India could hardly be completed in less than two years. But we have found instructive instances in more than one province, and have found in one province—the province of Oudh—sufficient to justify conclusions both as to the objectionable nature of the practice and as to possible remedies.

10. The province of Oudh corresponds to the old Kingdom of Oudh. It contains twelve districts and has a population of some twelve millions. After annexation it was a separate administrative unit under a Chief Commissioner. Since 1877 it has been amalgamated with the old North-West Province—the present province of Agra—and is now a portion of the United Provinces of Agra and Oudh. Conditions in Oudh are dissimilar to conditions in any other part of India. In Oudh the vast mass of landed property is concentrated in the hands of a comparatively limited number of individuals. It would require considerable space to describe how the Talukdari system grew up or attained the form it had taken in 1869. It is sufficient for the purpose of this report to state that in 1869 the Crown recognised only two hundred and seventy six individuals as Talukdars.

Act I of 1869, now in force in an amended form, regulates succession to the estates of Talukdars, regulates the rights of transfer in such estates and decides other points. The Talukdars of Oudh are noblemen of position. They are the land-holders of Oudh, only a comparatively small portion of the soil being owned by other persons. Their estates are usually of high value. The largest is of an estimated value of as much as seven crores of rupees, that is to say, nearly five million pounds. Only a very small minority of the estates are of slight value. When the question of succession to a Talukdar's estate arises in courts it is

* *Vide supra*

usually to an estate which yields an annual income of not less than a lakh of rupees.

11. Throughout the history of the Kingdom of Oudh, succession to such estates as had then come into being, had always given rise to disputes. These disputes were not then decided by legal tribunals. They were supposed to be decided by the King himself with the advice of his ministers, but were frequently decided by force of arms. These disputes were hardly ever determined on merits, and never on the consideration of merits alone. During the period after annexation 1856—1869 excluding the interregnum (1857—1858) these disputes were decided in law courts. In that period, however, there were not many such disputes. As the holders recognized in 1858 were mostly in existence, questions of succession had not then arisen very frequently, but from considerations as to what was likely to happen when such disputes did arise, and also to regularise the law as to the rights of this important body, the authorities after prolonged consideration determined to embody their decision in a legislative enactment. This took the form of Act I of 1869.

Unfortunately that Act, so far from improving the situation, has rendered it more obscure. Not only did it not foresee many of the difficulties, but it was so drafted that it was possible to arrive at conflicting opinions as to the interpretation of every essential clause. In suit after suit, that arose under it, the dispute was carried to the Judicial Committee in England. A new point was involved in almost every suit. Attempts have been made to improve the Act by amendment, but with little success.

The result at the present day is that in all questions relating to succession to or the transfer of rights of Talukdars of Oudh, the provisions of the law must be examined with extraordinary minuteness and a labyrinth of reported decisions must perforce be traversed. By no means every point has been determined, and a new dispute may still contain points on which there has yet to be an authoritative decision. The greatest expert in Talukdari Law has real difficulty in forecasting the result in any particular suit. In consequence litigation in Talukdari cases is of the nature of a gamble. It is not surprising that it attracts gamblers.

12. Where the contest is between the parties actually interested with no intervention from an outside financier, the situation is sufficiently unsatisfactory. The difficulties, which have already been described in the handling of ordinary contested cases, will be found in an exaggerated form. In Talukdari suits pleadings are more prolix, more complicated, and less likely to lead to useful issues. An overwhelming quantity of useless documentary evidence is filed by both sides, and the number of unnecessary witnesses produced is greater than in other classes of contested suits. Where ordinary parties would file ten documents, the parties to a Talukdari suit would file a hundred, where other parties would call one unnecessary witness the parties to a Talukdari suit would call ten. The witnesses are examined and cross-examined at inordinate length.

13. The element of champerty increases the delays. When a succession opens to a Talukdari estate, or even when an owner is attaining advanced years, or showing symptoms of failing health, there is a stir throughout Oudh, and occasionally outside Oudh. There are meetings, and consultations behind closed doors, in which the chances of various claimants to the succession are calculated minutely. After a time these consultations take effect, and finally either a financier or a group of financiers approach a claimant or a claimant approaches a financier. As the result a suit is usually launched.

14. There is a second class of suits. When a Talukdar is in possession, so long as his title can be attacked within the period of limitation, there are always to be found persons on the look-out for a possible weakness in his position. This weakness may in their opinion exist owing to their apprehension or misapprehension of settled facts, or their opinion may be based on the interpretation or misinterpretation of a dictum in a recent Privy Council ruling. But if a defect can be suggested, there are too many people ready to pounce upon the opening and to institute a suit. It may be the financier who originates the idea, or the discoverer of the real or imaginary flaw who invokes the aid of the financier.

15. The third class remains. There are persons who knowing that the title is unassailable on merits are ready to launch an attack relying upon false evidence. In the latter class of suits it is difficult to see how the claimant can be so sanguine as usually to expect success before an intelligent court. But, although they have faint hopes of succeeding, they have hopes, which are frequently realized, that they may be able to wear out the man in possession, until he is ready to pay sufficient blackmail as the price of the withdrawal of the claim. The worst men and the worst financiers are attracted by this class of suits.

The circumstances of Talukdari families are such that it happens more often than not that although the Talukdar himself is a man of wealth, the person with the next claim (in event of the Talukdar having no direct heirs capable of succession) is a man in humble circumstances. He frequently is no more than a peasant proprietor with some ten acres of land. The Talukdari system concentrates all property in the hands of one man. The collaterals are generally struggling and impoverished. It is here that the speculator finds an opportunity which is readily taken.

The extent of the practice can be best judged from a consideration of cases which have been decided. Some of these are given as illustrations. They are selected from a mass. There is no space for all.

16. We shall first consider the suits where a claimant has a genuine claim which is eventually successful.

A well known case of this nature was the case, the final stages of which are described in the decision of Their Lordships of the Privy Council in Achal Ram *v.* Kazim Husain Khan (I.L.R. 27, Allahabad 271).

Prithipal Singh was the Talukdar of the Birwa Mehnon estate. He died in 1859. The family which owned the estate was descended from a certain Ram Singh. There were two branches, the Datt Singh branch and the Bhawani Singh branch. Prithipal Singh had no male issue. He was succeeded by his widow Sarfaraz Kunwar. She died in 1870 and was succeeded by her daughter Brij Raj Kunwar who died in 1879.

On her death succession opened. There were apparently no persons left in the Datt Singh line. In the Bhawani Singh line there were among others three collaterals (1) Ude Partab Singh Raja of Bhinga, (2) Narindar Bahadur and (3) Ardawan Singh. Achal Ram, the husband of Brij Raj Kunwar obtained possession. In 1879 Ude Partab Singh instituted a suit against Achal Ram for succession to the estate. The suit failed. In 1886 Narindar Bahadur instituted a suit against Achal Ram for succession to the estate. Before he instituted the suit he sold a half share in the property in suit to Raja Kazim Husain Khan, who was made a party to the suit. That suit was also unsuccessful.

In 1888 Ardawan Singh, as a preliminary to instituting a suit, sold half the estate to the same Raja Kazim Husain Khan. The transfer was for the following consideration. A lakh of rupees was stated to have been paid to Ardawan Singh in cash. It was subsequently found that no money passed, and that Ardawan Singh received nothing under this head. The remainder of the consideration was maintenance at seventy rupees a month during the proceedings and half a lakh of rupees. The latter sum was not paid to Ardawan Singh, but retained by Raja Kazim Husain Khan in order to finance the expenses of the suit which was about to be brought. The balance was to be paid to Ardawan Singh. A suit was then filed on behalf of the two men in 1891, but later in the year Ardawan Singh was bought off by Achal Ram, and withdrew proceedings against him. Raja Kazim Husain Khan applied to continue the proceedings in respect of his purchase. He was permitted to do so. His suit was dismissed, but on appeal was sent back for re-hearing, on certain issues. It was finally decreed for half the estate in 1899. The Privy Council decision, upholding the decree was passed in 1904, twenty-five years after the death of Brij Raj Kunwar.

Their Lordships of the Privy Council upheld the validity of the transfer.

17. This case illustrates what can happen when a litigant enlists the support of a financier. Ardawan Singh obtained a very trivial amount in comparison with what was obtained by the financier. The financier obtained half of a very valuable estate.

It is true that had Ardawan Singh gone into court in order to contest the arrangement which he had made with Raja Kazim Husain Khan it is possible that he might have obtained a modification of the agreement. But owing to the course of action which he chose to adopt, he left the financier in possession of the field which they had agreed to divide. While the present provisions of

the law afford some protection to the litigant, the financier hopes that that protection will not be very great. We have come across other instances where agreements which appeared to be unconscionable have been left undisturbed.

18. We shall next consider the suits in which a claimant has a speculative claim which a man of reasonable prudence would not bring and which eventually fails.

The following suit was one of that class:—

19. Raja S. S. was a Raikwar Rajput owning the Taluka R. D. He was born in 1829 and died in 1899. He married two ladies. From his second wife he had a son U. N. S. who was born in 1861. Up to 1882 the father and the son were on reasonably good terms, but in 1882 they became estranged and the son was turned out of the father's house. Under Act I of 1869 it was open to the father to disinherit the son and devise the succession by will. It was not established that the father ever took this step. The attitude which he took towards his son was this. He asserted that U. N. S. was not his son, and went so far as to say that he was the child of Ahir parents. He maintained that attitude until his death. In 1888 the Court of Wards assumed management of the R. D. estate, as Raja S. S. was found incapable of managing his own affairs. The Court of Wards accepted U. N. S. as the Raja's son and gave him a suitable allowance from the estate income. On the death of Raja S. S. the Court of Wards handed over the estate to U. N. S. who assumed the title of Raja.

In 1901 a woman called K. J. B. instituted a suit against Raja U. N. S. for possession of the estate alleging that she was the sole surviving widow of the late Raja S. S. and was entitled to succeed to the estate, under the provisions of a will made by him. She further alleged that Raja U. N. S. was not the son of the late Raja and was the child of Ahir parents. She repeated the allegation which the late Raja had maintained during the latter years of his life. This woman withdrew her claim upon receiving certain benefit from Raja U. N. S. In 1906 a daughter of K. J. B. instituted a second suit against the Raja for possession of the estate claiming through her mother and as heir of her mother. This suit was also withdrawn, the plaintiff receiving benefit in consideration of the withdrawal.

Shortly before the period of limitation expired two persons C. S. and S. B. S. instituted one after another suits for the estate as the nearest collateral heirs of the late Raja S. S. It was eventually found that C. S. was the nearest collateral heir, and if he could have shown that Raja U. N. S. had no claim to the estate, he would have succeeded.

The decision of the suits turned almost entirely upon one point, *i.e.*, whether Raja U. N. S. was, as he had always asserted himself to be, the legitimate son of Raja S. S. and his second wife Rani G. K. or whether he was, as the plaintiffs asserted, the child of two Ahir servants of Rani G. K. The plaintiffs' case was that the Raja had been taken into the Rani's house at a very tender age,

and had been brought up by her as her own child, and had thus attained his position.

The suits were decided by the trial court on the 3rd January 1916 and the appeals were decided on the 12th April 1920. In the result it was found affirmatively that the story put forward by the plaintiffs was absolutely untrue and that there was not the least foundation for the assertion that Raja U. N. S. was the child of Ahir parents. The evidence which the plaintiffs produced to support that story was false and fabricated. The Raja, on the other hand, was able to establish affirmatively that he was the legitimate son of Raja S. S. and Rani G. K.

The value of the estate was in the neighbourhood of three quarters of a million pounds. The income was about three lakhs of rupees. The two plaintiffs were small peasants. Their suits were financed by an outsider, who put down a large amount of money towards the expenses of prosecuting their claims. His own name never appeared on the array of parties. The transfers which were made for his benefit were made in the names of third parties against whom it was not easy to execute a decree. As far as can be gathered, if the suits had been successful, the actual plaintiffs would have received a very small portion of the benefit, and the financier would have received practically every thing.

The defendant Raja U. N. S. was set a difficult task to prove his paternity affirmatively. At the time the suits were brought, he was nearly fifty-six years of age, and a great deal of evidence upon which he might have relied at an earlier period had disappeared, as witnesses had died. He had himself married into a Thakur family of high caste and his children had also married into Thakur families of high caste. Had the false evidence produced by the plaintiffs been believed, he would have been ruined not only pecuniarily, but socially, and his children would have shared his fate. In the end he was unable to recover anything like the amount he had expended in establishing his genuine case and was heavily out of pocket as a result of the litigation.

20. The main objections here are that the successful defendant incurs very heavy charges in order to defend a genuine title. He can never hope to recover these charges. The actual claimant is a man of straw. The financier is frequently (as here) not a party to the suit. He can always conceal his identity, even if he takes a transfer of the property, by not taking the transfer in his own name. The practice in fact is generally to take a transfer in the name of a relative of tender years, from whom nothing can be recovered in the way of costs. Occasionally the financier does not take a transfer of the property, and is content to secure himself by obtaining the execution of promissory notes in his favour. Even when a financier is a party to the suit and can be made liable for the payment of costs, the costs decreed are a mere fraction of the amount expended by the successful party. The inadequacy of the costs awarded (which in no way bear any proportion to the costs actually incurred in cases of any importance) can be remedied by

alteration in the rules, but, as the rules stand at present in Oudh as elsewhere, the inadequacy of the costs awarded is almost ludicrous. Small as they are, however, they are usually irrecoverable except in cases where the financier has been made a party to the suit.

21. We come finally to the suits in which the main intention is to force the payment of blackmail. We are naturally unable to quote instances, where blackmail has been levied successfully. We are satisfied, however, that there are many such instances. We are able to give an illustration of a suit of this nature which failed to effect its object.

22. The estate of A, one of the most important estates in Oudh, descended to Maharaja H. S. in 1855. He died in 1890 without issue. His widow Maharani S. K. claimed the estate mainly on the authority of a will of 1864. P. N. S. the son of the daughter of the Maharaja instituted legal proceedings to obtain the estate. There was considerable litigation. His claim was finally recognised as the claim of the son of a daughter who had been treated in all respects as the predecessor's own son. This claim was based on the provisions of old Section 4 of Act I of 1869.

Maharaja P. N. S. obtained possession of the estate and continued therein until he died without issue in 1906, leaving two widows Maharani S. K. and Maharani J. D. He had executed in 1891 a registered will in accordance with the provisions of Act I of 1869 by which he devised the estate to his younger widow Maharani J. D. with power to adopt. On his death he was succeeded by Maharani J. D. the estate being placed under the management of the Court of Wards. Maharani J. D. adopted in 1909 D. H. N. S. who was a member of the late Maharaja's family.

On the 11th February 1915 T. N. S. the nearest collateral in the line of Maharaja H. S. instituted a suit against the Maharani, D. H. N. S. and the Court of Wards.

In order to establish his right to sue, T. N. S. had in the first place to show that he was entitled as a collateral of Maharaja H. S. to succeed to the estate. There were two possible views. One was that after the succession of P. N. S. the property would devolve under intestate succession upon the line of the father of P. N. S. The other view was that it would devolve upon the line of his mother's father. The point was a doubtful one, and in the final decision of the Court of Appeal in this suit, the Judges composing the court were divided in opinion in regard to the principle governing intestate succession to P. N. S. But when the plaintiff succeeded in establishing the fact that he was the nearest collateral in the line of Maharaja H. S. he had to overcome the following obstacles before he could succeed to the estate.

In the first place he had to upset the registered will of 1891. Under Act I of 1869 Maharaja H. S. could devise his property validly to whomsoever he wished. If the will of 1891 stood, the breaking of the adoption of D. H. N. S. would not have assisted the plaintiff materially for it was open to Maharani J. D. to adopt

another child. Even if he had succeeded in upsetting the will, he did not succeed to immediate possession for under the law Maharani S. K. had in absence of a will a right to hold the property during her life time.

The plaintiff put his case in the following manner:—He commenced with a plea which had not the slightest foundation that the defendants were estopped from disputing his title. He then alleged that P. N. S. had succeeded Maharaja H. S. not on the grounds on which the Courts had held he had succeeded, but on other grounds which would bring the plaintiff within the line of succession. He then took up the one point on which he did not fail absolutely, that, applying old clause 4 of section 25 of Act I of 1869, intestate succession was with the line of Maharaja H. S. He attacked the will of 1891 on the ground that its execution had been obtained under undue influence; he also attacked it on the ground that it had been revoked.

Then came the sting of his case. He attacked the characters of both the Maharanis, *i.e.*, Maharani S. K. and Maharani J. D. He asserted that Maharani J. D. had never been legally married to Maharaja P. N. S. The parties were Brahmins. He suggested that Maharani J. D. was a Vaish girl who had been kidnapped by Maharaja P. N. S. and afterwards become his mistress. He accused Maharani J. D. of acts of unchastity with seven different men during her husband's life time and with acts of unchastity after her husband's death.

In the end every allegation which the plaintiff had made in respect of undue influence having been exercised over the Maharaja to cause him to make the will of 1891, the revocation of the will, the unchastity of these two ladies and the allegation that Maharani J. D. was not a Brahmin and had not been married to Maharaja P. N. S. were found to be absolutely false. The plaintiff was convicted of perjury in respect of the statements which he had made in court and some of his more important witnesses were also convicted of perjury. This was not a case of unsubstantiated claims. It was an absolutely false case supported by false evidence.

23. How did this claim come into being and what was its object? The plaintiff was a man of no position whatever. His total income was less than Rs. 50 a month. He never at any time of his existence had sufficient funds to finance the litigation. The litigation was not inexpensive. Leading counsel were employed on his behalf. It was self-evident, that he was being backed by men possessed of a fair amount of money, who were expending their money freely. Their names never transpired. In no way was any responsibility brought home and it was difficult to see how responsibility could have been brought home to his supporters. This was how the claim came into being. A worse case of champerty could hardly be discovered.

The next point is why this suit was brought. From the statement of the case already given it is clear that no reasonable man could ever have hoped that such a claim would succeed.

This fact was clearly recognised by the persons responsible for its institution. But they had hopes—and very strong hopes—that the disgraceful false allegations that they were making against the characters of two high caste Indian Maharanis would bear fruit. What they hoped and expected was that they would be bought off to withdraw the case. They were not successful in this respect, mainly owing to the fact that the Court of Wards was party to the suit. If the matter had been left to the ladies themselves, they might have been successful.

In the end the estate of A was left to pay the costs of defending the suit which may be estimated in the neighbourhood of two lakhs of rupees. There was no great delay in disposing of the suit as the authorities put a special judge on to hear it at the first convenient opportunity. It was instituted as has been said on the 11th February 1915 and was decided by the judge on the 18th October 1916. The appeal was decided on the 4th March 1918.

This case is sufficient to show what can be the sufferings of innocent people, so long as persons such as the plaintiff in this suit are permitted to bring such claims, and so long as the law effectively safeguards those who conceive the idea and provide funds for its execution. It is true that the plaintiff was convicted of perjury and sentenced to imprisonment, but the men behind the plaintiff underwent no further loss than the loss of their money. They were never brought to justice. The main sufferers in the case were the two unhappy ladies who were insulted and disgraced by the false witnesses produced by the plaintiff.

24. If these champertous suits were conducted fairly and honestly, the situation would be bad enough, but they are not fairly and honestly conducted. It is clear that in the last class of suits, they cannot be conducted otherwise than dishonestly owing to the very nature of the claim, but even in the other classes there is much to take exception to.

The records show that in both classes oral evidence is fabricated and produced in mass, forgeries are very common, attacks of the vilest personal nature are made, as has been seen, on the persons in possession, especially when they happen to be women. Every form of licensed abuse is employed when the intention is to wear down the defendant so as to drive him to buy off the plaintiff.

The production of one false witness after another is likely to assist in the attainment of that object. It is a noticeable feature that the financier who conducts these proceedings usually expends less than his opponent. His practice usually is to pay his witnesses in promises rather than in cash. From the point of view of delay the question is of sufficient importance. It has wider aspects. The strain involved in meeting claims of this description tells severely on the successful defendant. Certain estates have been crippled by such expenditure. Landlords so impoverished are apt to be less considerate to their tenants, and the tenants suffer. The canker eats into the agricultural life of the whole province, and through it into the industrial life.

25. No solution has yet been found. The situation is complicated by the difficulties of protecting the persons interested from themselves. The Talukdars seem reluctant to consider remedial measures. Attempts made by presiding officers to persuade even the party who is in the right not to adduce unnecessary evidence and not to protract the proceedings unduly are usually resented, sometimes resented bitterly. Better advice should be expected from counsel, but it is not always forthcoming. Even as matters stand, much might be done which is not done by the injured parties to help themselves.

26. The main objection which we have to the existing state of the law is that it does not in practice protect the litigant sufficiently against the financier, and that it usually in no way protects the party against whom a speculative case is brought. We do not propose any alteration of the law which will make such agreements as fall within the definition of champertous agreements in the English Law void under section 23 of the Contract Act (Act IX of 1872). We propose no alteration under section 6 of the Transfer of Property Act (Act IV of 1882), but we do propose that all agreements of a champertous nature should be made voidable under the provisions of Act IX of 1872. We suggest that whenever an agreement is made by which a financier secures undue advantage to himself by assistance given to the successful party in litigation, it should be open to that party to avoid the agreement by suit on the condition that he refunds the actual consideration with interest to be fixed by the court. Such interest would be awarded at a higher rate than the prevalent rate in view of the risks involved but should not be unreasonable. Where the agreement is merely for the repayment of the amount advanced with reasonable interest even when that interest is higher than the ordinary rate, it would be maintained. In so far we do not materially alter the law as it was interpreted in I. L. R. 11, Allahabad, 57. We extend the law laid down in I. L. R. 15, Allahabad, 893. There it was decided that where the financier had obtained title to the property in suit for inadequate consideration the parties should be put on terms. We would carry this further. In no circumstances would we allow the financier to obtain title to the property in suit if the plaintiff is prepared to pay what the court considers to be a sufficient sum. We would, however, give the financier a charge upon the property recovered for any sum awarded to him. The modification in the existing law is very slight. We are proposing a statutory alteration to give effect to principles already accepted in the main. But we consider statutory enactment necessary, for we are satisfied on the facts that the law is not properly understood by the persons entering into these transactions.

27. There remains the situation of the defendant to an unsubstantiated champertous claim. In Oudh a special remedy is necessary to protect him having regard to the conditions in this province.

It seems to us that in all cases in which an element of maintenance or champerty can be shown express power should be given

to the court not only to award, in the end, costs on a special scale approximating to the actual costs reasonably incurred by the defendant but also to require security for the estimated amount of such costs or such proportion thereof as from time to time during the progress of the suit the court may think just. This rule should be made applicable even where the financier has taken a transfer of the property claimed in the suit and has joined as a plaintiff. The defendant should have the benefit of a presumption that a transfer is champertous if taken from a claimant who is out of possession and followed by a suit to establish his transferor's title.

Objections have been taken that such alterations will tell hardly against an honest financier, and will prevent a claimant with a good claim from obtaining such financial assistance as will enable him to proceed with the suit. We adhere, however, to these suggestions. We consider that the defendant in a Talukdari suit deserves as great a protection against a claimant of this nature as a defendant enjoys already under the law, in accordance with the provisions of Order XXV, against a plaintiff who resides out of British India and does not possess sufficient immovable property within British India. The position of the poor but honest litigant with a claim likely to succeed should not be greatly endangered. If a claim is a good claim, and has been recognised as a good claim, the financier takes little or no risk in finding security for the costs of the other side, for he will never be called upon to pay the costs. He should be in a position to judge whether the claim is good or not. We see no reason to protect the persons who bring gambling claims.

In any circumstances something should be done to protect the other side. There are the rare instances of the poor plaintiff with a good case who must get his money somehow in order to proceed with it. Even then, as matters stand, in order to proceed with the case he usually has, as a preliminary, to part with the substance and retain the shadow, in circumstances which frequently render it advisable for him to sell his title out-right. On the other side there are a mass of unfortunate people who are exposed to prolonged anxiety and are finally involved in excessive expenditure in order to save their just rights from speculative financiers. It is this majority who deserve protection.

We are not satisfied as regards provinces other than Oudh that special power to order security for costs is necessary, but the matter may be commended to the attention of High Courts.

Finally we wish to emphasise the necessity of the courts taking criminal proceedings against persons who have been found by the courts to have instituted blackmailing or dishonest claims.

If these suggestions be accepted, it is possible to hope that there may not be so many persons who will be ready in the future to launch false or unfounded claims. If these remedies are adopted, it seems more than probable that a large number of such persons will refrain, but even if they do not refrain, the successful defendant with an honest title will be recouped for the expenditure incurred and then the evil will be lessened considerably.

CHAPTER 44.

Costs.

We have in the Chapter on Local Bars dealt with the question of the remuneration of legal practitioners in the various stages of a litigation and indicated that a person who resorts to a court for relief does not get even from the most unreasonable opponent an adequate measure of compensation. The existing provisions which regulate the award of costs are contained in section 35 of the Civil Procedure Code.

Section 35 provides that " subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court, and the court shall have full power to determine by whom or out of what property and *to what extent* such costs are to be paid, and to give all necessary directions for the purpose aforesaid. The fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of such powers." Though this provision is general, it is well known that the costs awarded by courts under rules framed by the High Courts, do not make any provision for the loss of time caused to the successful party and are often not commensurate with the actual expenses incurred by him. So far as we have been able to ascertain, costs in no part of India, in the case of a successful plaintiff, include anything more than the court-fees, the process-fees paid into court according to the Rules of Practice of each province, a percentage on the value of the suit—in many cases 5 per cent.—for the fees of his legal practitioner, and a few minor items of incidental expenditure. No provision is made for the expenses of the journey to headquarters which is necessarily undertaken before the plaint or written statement can be prepared, for the loss of time and of earnings which such attendances may involve, for the cost of making copies of pleadings, applications or affidavits which by the rules are required to be served on the opposite party or for the money spent in paying searching fees at Registration offices in order to obtain necessary documents. In some provinces when a judgment is put in evidence by the successful party the cost of obtaining the copy is not recoverable but only the filing fee. The same applies to copies of registered documents. As regards searching fees, it has to be noticed that in mortgage suits and in execution it is frequently necessary to get an incumbrance certificate the cost of which should always be paid for out of the security or added to the cost of execution. We consider that there is no practical difficulty in giving a proper indemnity to a successful party in such cases.

2. As regards compensation for the necessary attendance at the court's headquarters let us take a concrete example. Suppose

a man institutes a suit falsely claiming possession of a house from his neighbour. The neighbour, to meet the case, has to engage a pleader and get a written statement prepared, contesting the plaintiff's claim. For that purpose he will have either to go himself to the headquarters of the court where the suit has been laid or send there an agent for that purpose with instructions. Money will have to be spent for such travel. He must stay at the headquarters for some time according to the convenience of his pleader. After the written statement is filed, usually there is a hearing for settlement of issues. The defendant or somebody on his behalf has usually to be present, as the court might desire to examine the party or somebody acquainted with the facts of the case. Then, when the trial begins the defendant has to wait for a short or long period according to the nature of the case, before the evidence on the plaintiff's side is closed. Even if he is not there, his agent at least has to be present. In most cases the defendant should get into the box and speak to his defence. If he does not so, adverse inferences will be drawn. Having done that, in several cases he has to wait till his other witnesses are examined or to appoint an agent to watch his case. This is the normal course of a contested suit. All this travel and stay mean expense and loss of time which he might have utilized for his business. In such a case the plaintiff also has to incur similar expenses. In addition, he has also to incur the cost of preparing copies to be served on the defendants. The expenditure connected with the travel to the headquarters and the sojourn of parties there is not included in the taxation of costs. We think it desirable not only with a view to compensate an innocent party for loss incurred owing to no default of his, but to prevent frivolous defences being advanced, that some provision should be made for the payment of such costs by the unsuccessful party. The objection to such a course being adopted is the practical difficulty in estimating what such expenses and costs are or are likely to be, and an enquiry concerning such matters causes more delay and waste of the court's time. A rough and ready method would be to pay the party for such visits in each case, at the conclusion of the trial, what he would have been paid if he had been cited as a witness. Courts might have power to award costs to him for (say) three such attendances in a contested case and for two in an uncontested case. For similar reasons, in the case of applications for execution, and in appeals and second appeals also, the successful party should be allowed the expenses which he has to incur in going to and from the place where the application or appeal has to be filed and is heard. The same method as is suggested above in the case of suits may be adopted for calculating the amount payable.

3. The new section 35-A runs as follows:—" If in any suit or other proceeding, not being an appeal, any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter as against the objector, such claim or defence is dis-

allowed, abandoned or withdrawn in whole or in part, the court if the objection has been taken at the earliest opportunity and if it is satisfied of the justice thereof, may, after recording its reasons for holding such claim or defence to be false, or vexatious, make an order for the payment to the objector by the party by whom such claim or defence has been put forward, of costs by way of compensation." Though conceived with the object of putting down false and vexatious claims or defences, its operation is hemmed in with conditions, which in our opinion greatly detract from its usefulness. It has to be established that the claim or defence was false or vexatious to the knowledge of the party putting it forward and the objection must be taken at the earliest possible opportunity. It will be difficult to prove affirmatively that any claim is false or vexatious to the knowledge of the party by whom it has been put forward, and to insist that the objection should be taken specifically on that ground at the earliest possible opportunity at or before the framing of the issues means that it should be taken at the first hearing. An omission to take the objection in a specific form may very easily occur. As this provision is very recent and must be taken to represent the opinion of the Legislature it seems reasonable that some further experience as regards its utility should be obtained before the Legislature is asked to reconsider the necessity for all of the elaborate safeguards which were inserted. The section has not yet been brought into force in most provinces. We think that very little further experience should show whether the provision is likely to be of any real service. The falsity of a case, whether it is entirely dishonest in substance or is merely a bad case, is only made plain as a rule at or towards the end of the trial. The evil which section 35(A) is directed against cannot, we think, be met save by arming the trial courts with a complete discretion. If a right of appeal is permitted, this right might, in our opinion, be regarded as a sufficient safeguard.

4. It is frequently of great service that pleadings filed in the mofussil courts should be typed and it may be that in some cases where the cost of printing is low it is even reasonable that they should be printed. Everything possible should be done to save the eye-sight, time and trouble of the court in dealing with documents so important as the pleadings. We do not consider that it would involve hardship if a successful party who had filed his pleadings in type or in print were allowed to recover the cost of having the document typed. Difficulties might arise if printing charges were allowed.

CHAPTER 45.

Ex parte injunctions.

1. Much delay and injustice is occasioned by interlocutory orders for stay of proceedings, stay of execution, interlocutory injunctions and by the holding up of proceedings pending applications in revision. For this reason we have felt obliged to recommend that careful and complete statistics should be kept so as to show what has happened. We are very loath to suggest a heavy increase in the burden of the statistical work done in the offices of courts and we quite appreciate that useful figures bearing upon these matters are not easily compiled. It is urgently necessary, however, that delays occasioned by orders of the class we have referred to should be minimised.

2. It appears to us that interlocutory injunctions are, throughout India, granted much too freely and without sufficient care to impose terms. There is moreover a specially noticeable freedom in the granting of such orders *ex parte*. It seems to be very inadequately appreciated that the right to an interlocutory injunction and the right to have it granted *ex parte* are two very different things. We have been struck by the fact that in cases in which it is clear from the plaint itself that the parties have been at difference for months as to a right in immovable property, the plaintiff has been granted an *ex parte* injunction to restrain digging or building operations on the part of a defendant in possession. Having regard to the congestion in many courts one can readily see that a plaintiff by such an order is put at once into a strategic position. Indeed a lax practice in granting such orders is an open invitation to blackmail. We do not attempt to set out here the principles governing the grant of interlocutory injunctions or the special conditions under which it is right to grant them *ex parte*. It may be that a reiteration of these by circular orders of the High Courts would do something to improve the practice.

3. The causes of the evil are, however, complex. The first cause is that junior officers not considered fit to exercise very high small cause court powers have under the ordinary procedure to deal with applications for injunctions. The smaller the value of the right alleged to be infringed the more likely it is that such applications will come before junior officers. Such officers are not always able to appreciate the business consequences of the orders they make. For the purposes of an *ex parte* application they are far too uncritical of plaints and affidavits. They do not appreciate the unfair advantage which plaintiffs constantly seek to get by lying by, by pretending that they have just heard of an invasion of their rights and by putting forward ludicrous suggestions of irreparable damage. Experience shows that the great majority of affidavits with the words " irreparable damage "

are proof of little save the absence of irreparable damage. In many cases the plaints and affidavits fail utterly to explain that anything has happened in the last few days to justify a sudden claim to interference with the defendant from behind his back. They frequently show that the plaintiff might and should have brought his suit long before and proceed on the assumption that so long as it is conceivable that the plaintiff's right is being infringed the court is bound to restrain the defendant until the distant day when the question shall be tried out. Thus, we think that a main cause of the bad practice is inexperience and weakness on the part of officers.

4. Another cause we believe to be that courts are too apt to look merely at the rules in Order 39 of the Code. These rules are a statement of the general conditions under which interlocutory injunctions *may* be granted. They are a statement—that is to say—of the powers of the court. The question whether such an order *should* be granted involves a great deal more than mere compliance with these conditions. It involves a certain amount both of law and common sense. By rule 3 of this Order the court is required before granting an injunction to direct notice to be given of the application to the opposite party, in all cases except where it appears that the object of granting the injunction would be defeated by the delay. Accordingly, looking solely to the words of exception contained in this rule, the courts appear to grant *ex parte* injunctions to restrain all sorts of acts even although it is manifest that the plaintiff has long known that the acts were intended. It is much to be wished that the subordinate courts would appreciate that an interlocutory injunction should be granted *ex parte* only in very exceptional circumstances and practically speaking should never be granted unless the plaintiff establishes in a convincing manner that by no reasonable diligence on his part could he have avoided the necessity of applying behind the back of the defendant. It is important to notice that the question here is not whether since the plaint was filed he has had time to serve the defendant. Plaintiffs constantly come to court at the last moment for the purposes of getting the advantage of commencing with an *ex parte* injunction. Even in cases where this is not the deliberate purpose it is wholly wrong to reward dilatoriness at a heavy expense to the opposite party.

5. Again, we consider that a court which is not prepared to hear the defendant on an application of this sort in a few days and which gives an *ex parte* injunction which it knows must continue for weeks is exercising its jurisdiction in a highly dangerous manner. Such injunctions when granted at all should invariably be limited to hold good only until a specific and early date. By early is meant for this purpose not a month but a week or less, *i.e.*, a minimum time within which a defendant can come effectively before the court assuming that to get rid of the injunction he will be prepared to use the greatest expedition possible.

6. Again when such an injunction is granted the greatest care should be taken to state exactly what the acts forbidden are. Such orders when drawn up frequently disclose incurable vagueness or they are made up by copying out a long rigmarole from the plaint. Where it is sought to restrain a series of acts of different kinds, with respect to one of which some possible claim of urgency can be made, the *ex parte* injunction frequently embraces all the possible acts that can be objected to by the plaintiff.

7. The recklessness with which injunctions are sometimes granted *ex parte* is a special evil in a country where rights and interests in land are apt to be complicated and uncertain. It is, for example, a heavy drawback to industrial progress if a firm buying land to build a factory, however careful it may be to get a good title and however good in fact be the title which it gets, should run a great risk of having expensive building operations stopped for weeks by an injunction granted by a junior officer at the instance of a plaintiff claiming a small and fractional interest in a portion of the land. Again, we understand that in recent times the ordinary operations of local bodies are being constantly interfered with by *ex parte* injunctions at the suits of plaintiffs whose grievance is in no way commensurable with the damage which an interlocutory injunction is bound to do. There can be no greater encouragement to blackmailing and malicious suits. The serious interruption of public business in the interest of a protagonist in a local quarrel is by no means unknown.

8. We have been at pains to consider why it is that subordinate courts constantly grant *ex parte* injunctions in circumstances which in no way call for the exercise of this very drastic jurisdiction. We think that some part of the explanation lies in the fact that if notice goes to the defendant he is extremely unlikely to file his affidavit so as to enable the application to be heard as a contested application until after the lapse of a month or more: that when a contested application comes on for hearing parties and their pleaders will put everything in issue—even facts that are obviously true,—and will be restrained only with difficulty and after much waste of time from an endeavour to fight out the whole suit upon the application. Accordingly there seems some basis for the view that time will be saved by granting the injunction *ex parte* in the hope that the defendant, until the trial of the suit, will find it impossible to get rid of it, and the damage having been done, will put up with the injustice. All this, however, is entirely wrong. If the plaintiff's case taken by itself shows sufficient ground for an interlocutory injunction and the defendant has been given a short period within which to indicate his defence the fact that he is not able to do so fully will justify a reasonable postponement of the hearing of the application, but it will not necessarily justify an unconditional postponement. It is quite possible that a short adjournment should be granted, but that at the same time an injunction to cover this in-

terim should be granted *ex parte*, or that an undertaking should be obtained from the defendant as a term of the adjournment. Much is gained by bringing the defendant before the court and finding out the kind of case he claims to be able to make. If diligence will pay he will be diligent. It is not the case that once notice issues to a defendant of an application for injunction the court's powers to grant in a proper case an *ex parte* injunction have come to an end. It seems to us that definite rules are required whereby the defendant shall be served with a copy of the plaint and affidavit and given a very few days thereafter within which to file his affidavit in answer; the plaintiff in like manner should have a very short time indeed within which to file his affidavit in reply, and the date for hearing the contested application should be definitely fixed accordingly. The judge should then either dispose of it or if it be necessary to adjourn, should take proper steps in the presence of the defendant to make an order covering the adjournment period, and covering this only to the extent that is absolutely necessary.

9. This matter is one which urgently requires the attention of district and High Court Judges both when dealing with appeals and at inspections. What is wanted is that the materials upon which *ex parte* injunctions are granted should be scrutinised in as many cases as possible by the inspecting officer. When he finds them to have been insufficient he should go through them with his subordinate and explain their insufficiency. If the subordinate officer's ideas are defective as to the principles which should govern the exercise of the powers given by Order 39 the inspecting officer will have every opportunity to discover the defects. The order as formally drawn up should be very carefully examined. It should be noticed whether any provision has been made for ensuring to the defendant an early opportunity to be heard or whether the order made *ex parte* has been limited to take effect for a substantial or for an indefinite time. A very important matter for inquiry is whether or not the court granting the injunction *ex parte* has been played with by the plaintiff failing to pay the process fee, failing to supply an identifier or failing to serve some *pro formâ* defendant in the same interest? If so, it will be desirable to inquire as to what step was taken by the court. It may be found that the same order by which the *ex parte* injunction was granted gave the plaintiff a week in which to deposit the process fee. Or it may be found that when the defendant appeared to contest the injunction the court was engaged in trying old suits and adjourned the matter for months, or adjourned it for the plaintiff or his pleader's convenience, or in order to let the plaintiff make a new case. An inspection which is worth anything will always disclose the merits or demerits of the way in which injunction matters have been handled. So far as comparatively junior officers are concerned, we are convinced that no great improvement will be effected in this matter unless they are made to appreciate that the granting of an *ex parte* injunction is a serious responsi-

bility; that having granted they are under a duty to take the greatest pains to do everything possible to protect the absent defendant; and that they will in general be called upon at inspections to show that they have handled injunction matters not merely without breach of the rules in Order 39 but in accordance with legal principle and common sense.

CHAPTER 46.

Numerous Parties and Representative Suits.

The opinion has been expressed more than once by persons of experience in the law that there is need to extend the scope of what may be called " representative suits " so as to include cases in which there is a large number of parties but to which Order 1, rule 8, of the Code does not apply. There are obvious attractions in this proposal and it would seem only reasonable to expect that in India a more highly developed system of " representative suits " than is to be found in England would become a necessity. In the course of our enquiry, however, we elicited very little that was definite or constructive on this subject and no scheme was brought to our notice which seems to us to offer a balance of advantage over disadvantage. We are not prepared to recommend an extension of the present rule either by taking its very general language and making it wider, or by taking the principles by which, according to the decisions, it is controlled and merely abrogating some of these. We would not, however, rule out in advance specific measures for dealing with specific types of case if in any province the volume and character of the litigation calls for special treatment of certain cases. The observations which follow are intended not only to explain why we have arrived at a negative result, but also to show our view of certain important features of the problem, of the danger points and of the possible alternative remedies.

Order I, rule 8, runs as follows :—

" Where there are numerous persons having the same interest in one suit, one or more such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct."

This rule is in substance taken from Order XVI, rule 9, of the Rules of the Supreme Court in England. In addition to rule 9, Order XVI of the English Rules contains rules numbered 32 (*a*) and 32 (*b*). Rule 32 (*a*) applies to cases in which the right of an heir at law customary heir or the next-of-kin or a class depends on the construction which the court or a judge may put upon an instrument. In such cases the court is given power by the rule to appoint some one or more persons to represent such an heir at law, customary heir, or next-of-kin, or class and the judgment of the court is made binding upon the heir at law, customary heir, or next-of-kin, or class so represented. Rule 32 (*b*) extends the same principle to any other case in which an heir at law or customary

heir or any next-of-kin or a class is interested in any proceeding. These two rules, however, come under the heading " administration and execution of trusts." They are not of universal application.

There is a further rule in the same Order (Order XVI, rule 37) " In all cases of actions for the prevention of waste or otherwise for the protection of property, one person may sue on behalf of himself and all persons having the same interest."

2. The Indian rule requires the court when it makes a representation order to give notice to all persons affected either by personal service or by advertisement. It gives, moreover, a right to any such person to apply to the court to be made a party to the suit. The cases in which the Indian or the English rule can be applied as regards defendants are not numerous. They would seem, as a rule, to be cases where the plaintiff claims a declaratory judgment defining his rights as against a numerous class—the class of people holding certain rights in a market, a body of persons who have formed themselves into a society or club, a person who has taken part of an issue of shares or debentures conferring upon the shareholders or debentureholders equal rights. In such cases the rule can be applied so long as the relief sought is not an individual relief as against one defendant in distinction from another.

3. If we try to set out what seem to be the cases in which parties tend to be numerous, we find that so far as India is concerned they are as follows:—

(1) Suits by and against members of a joint Hindu family—Mitakshara and Dayabhaga.

(2) Suits by and against heirs of an intestate Hindu or Mohammadan.

(3) Suits by reversioners or others against persons holding land under an alienation made in the past by a limited owner whose right to convey is attacked.

(4) Suits by and against co-owners.

(5) Suits by and against villagers or communities.

(6) Suits by and against Karnavans and Anandaravans in Malabar Tarwads.

(7) Suits against a number of tenants and under-tenants raising analogous questions as to the rate of rent, or depending on a root question as to the plaintiffs' title.

4. So far as the two last mentioned classes are concerned they seem to us to present special local problems. The Malabar tarwad is an institution of an exceptional character. We were unable to discover that this question had received much attention at the hands of those who are familiar with the social conditions of these communities and the law applicable to them. The most careful consideration of the structure and circumstances of such a community is clearly necessary for the present purpose. If, therefore, we make no recommendations on the subject of the Malabar tarwad it is not because we consider that the present law is satisfactory or that

reform is necessarily impossible. Nor, so far as third parties are concerned, do we regard the question as one which can be entirely concluded by the opinion of the members of such communities.

5. Again, as regards the seventh class above mentioned the rent laws and revenue systems of different provinces diverge much too widely to admit of any general solution of the difficulty. Under this head the main types of case in which the number of parties is apt to be unmanageable require to be carefully singled out, and considered concretely with reference to the revenue machinery or to Acts like the Bengal Tenancy Act. If the expression " same interest " in Order I, rule 8, is to be widened, it is necessary to know what similar or analogous interests may in each type of suit be regarded for the purposes of the claim for relief as identical. It is necessary further to consider the practical effects of so doing including the effects in execution proceedings or in subsequent litigation. These are matters which must be inductively approached. High Courts by their rule-making power or local Governments and legislatures may see their way from time to time to a limited experiment, but we are satisfied that the experiment will in all probability have to be different in Madras and in the United Provinces, in the Punjab and in Bombay. The " recorded landholder " and the " recorded tenant " are words that mean much in one province and little in another. In Bengal when a rent decree is obtained and the holding is sold in execution the question whether and in what circumstances the defendant represents the complete interest in the holding by representation or otherwise has been the subject of many decisions under the Bengal Tenancy Act. Again, it is possible for a ryot holding under a trespasser to acquire in certain circumstances an occupancy right which is good as against the true owner.

6. Both the English and the Indian rules—they differ slightly—are subject to the obvious comment that they try in substance to state the matter in the same form of words for plaintiffs and for defendants. Where a person has a right in respect of which he cannot claim relief save upon the terms that he must permit other persons to share in the benefit of the relief, the difficulty of allowing him to represent such other persons is comparatively slight. The creditors' suit for administration of the estate of a deceased or a debentureholder's action to enforce the security are common examples of this. In such cases the requirement of leave would seem to be of doubtful necessity. In any case the main difficulties would appear to be (1) ensuring that the suit will not be so conducted as to end in total or partial dismissal owing to fraud or negligence; (2) that in doubtful cases persons who have no property will be put up to sue on behalf of others who could be made answerable for costs. Other persons who have notice of the suit may, however, apply to be made parties. It does not seem necessary so far as plaintiffs are concerned that they should all have the " same interest " so long as they have a common grievance (as distinct from analogous grievances) and the relief sought is not individual (*e.g.*, damages) but one relief which is beneficial to them all. The words

are " same interest in the suit " and not " same interest in the property in suit." So far as we can see the true construction of the rule according to the decisions is to this effect, but the rule appears to be narrower than it is. The real question here is whether in order to enforce his own right a plaintiff is or is not put by the law as it now stands in the position of having to join with himself a large number of other persons in order that his suit may not be dismissed as defective. There may be some fairly common types of suit of such a character which are not within the scope of Order I, rule 8, as understood in certain High Courts and which might be brought within it. The difficulty, we believe, to be that no one has much confidence in the language of Order I, rule 8. The rule is only intelligible when construed by the aid of the practice of the old Court of Chancery. It must be noticed, however, that under the present Code (O. I, r. 1) it is *open* to plaintiffs to join together in one suit in many cases where the law does not *require* them so to do. The manager or *karta* of a joint Hindu family can in some circumstances sue on behalf of the family apart altogether from Order I, rule 8. Again, it seems clear that as against a trespasser one of several co-owners can maintain a suit though it is not so clear whether the form of decree in ejectment can or should be limited to a decree for joint possession to the extent of the plaintiff's share. Again, in a suit by the heirs of a deceased Mahommedan to recover a debt due to his estate the law as to Succession Certificates supplies a solution. So far as plaintiffs are concerned we find it difficult to satisfy ourselves that Order I, rule 8, requires to be made wider. From a defendant's point of view, who desires to avoid a succession of suits brought by different persons one after another there may be room for some complaint as regards the present procedure: this, however, is another problem.

7. When we come to Order I, rule 8, as it applies to a numerous body of defendants, here again, a person is to be bound by the decision although he is not effectively a party, but different considerations apply. Subject to a discretion in the Court to allow him to appear and defend for himself certain other persons nominated by the court at the instance of the plaintiff are to be constituted his representatives. Notice of the suit may be given in certain cases by public advertisement—an ineffective device in many parts of India. The purpose of the suit is to damnify, not to benefit, the represented person. This makes a great difference for the purposes of any proposal to permit suits to be brought under a representation order claiming relief of a kind inconsistent with the rule as it at present stands. Such proposals may easily give rise to greater difficulties than they would obviate. Even in extreme cases—like the suit referred to by Sir Tej Bahadur Sapru in his note of 6th December 1922 where over 1,200 persons were defendants—unless all defendants have the same interest in the suit, it may well be better to leave the plaintiff to cope with the difficulties which fate or folly has imposed, than to permit him to bring one suit for the purposes of affecting in different ways the rights or interests of a large and floating population, many of whom will

wholly fail to understand what is happening. If there are insuperable difficulties of this sort in the plaintiff's way, it is better that these should be encountered at the beginning rather than postponed to the stage of execution or relegated to subsequent litigation. Again, the interests even of members of the same Hindu family are not seldom remarkably divergent when they might have been supposed to be identical. The colluding defendant is by no means uncommon and will tend to figure prominently as a representative defendant if the present rule be relaxed. Even when "the interest in the suit" is the same, there may be side interests affecting parties differently. In the last resort a plaintiff can always attempt to make special terms with the representative in fraud of the represented.

8. The root notion of the rule is that of a class, but the mere fact that a number of persons are all interested to oppose the declaration or other relief sought by the plaintiff does not make them a class. Given such an interest, the questions are: What shall be deemed to be classes? What forms of relief shall in the case of each class be permitted? In which of such cases shall there be a power to dispense with notice and to rely on some form of public advertisement?

9. Service by advertisement is allowed by the rule where personal service is "not reasonably practicable" from the number of persons or any other cause. This is necessary and unobjectionable in some types of case, *e.g.*, about the rights of way of the inhabitants of a village. But it is quite common in India for personal service to be highly difficult; and the reasonableness of binding a person by a decree in proceedings of which he has not had actual notice differs according to the nature of the suit. If the procedure by advertisement was ruled out as regards certain types of case it would be much easier to apply the representation principle. A defendant who is personally served with a notice under Order I, rule 8, is not likely to be refused the right to make his own defence for himself if he shows any semblance of reason in his request. If, on the other hand, he is satisfied to let others defend, the plaintiff gains much: he does not have to serve him with copies of the plaint and other documents; to read and wrestle with another written statement; to substitute his heirs on death; to serve notices of appeal. These are the things that matter: but for these it is almost as easy to implead a party as to serve him with notice. In suits with numerous defendants, the great majority of them take no part in the proceedings after service of the summons. They attain frequently great importance by dying in the middle of the suit or pending the appeal.

10. Let us consider two types of case. Trouble is frequently caused by suits against numerous heirs of a Muhammadan for a debt due by the deceased. It would not seem unreasonable to prescribe by rule that a representation order might be made, provided that personal service of notice was necessary on all the heirs, and that, as against represented persons, the decree should be in

a form which would have the same effect as if judgment had been given against the deceased in his lifetime. As against persons who were impleaded as defendants in the full sense of the term the judgment might be as at persent. But before any such rule as this could be approved certain questions must be answered. In a suit against one of several heirs to what extent is the defendant liable? Is it to the extent of his share or in proportion to his share or to the extent of assets that come to his hands? In what circumstances will a suit against the heir in possession be regarded as an administration suit and permitted to affect the rights of other heirs? Not till these questions are answered will it be possible to say whether such a rule as above suggested is in general needed, whether it would be worth while, whether it could be worked out in practice without in effect changing the Muhammadan law, and whether other methods might not work better.

Now, it appears *first* that the property of an intestate Muhammadan vests in his heirs in specific shares at the moment of his death. *Secondly* that the liability of heirs for debts of the deceased is different according as the estate has or has not been distributed. Before distribution they are liable to the extent of the assets to which they have succeeded. After distribution each is liable to the extent of share of the debts proportionate to a share of the estate. *Thirdly*, distribution is not liable to be suspended until payment of the debts. *Fourthly*, different High Courts take different views as regards the case where a creditor sues some only of the heirs before distribution has been made. Calcutta in such a case treats the suit, if brought against heirs in possession of the whole or any part of the estate, as a suit to administer the estate of the deceased; and holds that a sale in execution binds other heirs who were not parties. Allahabad holds that the rights of heirs not impleaded are unaffected by such a sale. Bombay seems to have come round to the latter view and recent opinion in Madras appears to show this tendency.

Looking broadly at the matter, the introduction of the "representative suit" as regards such claims made after distribution of the estate seems to be beset with insuperable difficulties. Prior to the distribution of the estate the difficulties are less, but the need for a new procedure would appear to vary according as the law is taken from the Calcutta High Court or the other High Courts. Even prior to distribution it would seem to be matter for consideration whether a suit against representative heirs should be permitted save for the purpose of obtaining a decree for administration under which all parties could come in and establish their own interests.

11. Let us next take the case of a suit against a large number of persons in possession of different plots of land as the lessees or other transferees of persons who hold or held under an alienation which is attacked by the plaintiff as invalid or as no longer binding against him. The ground of the invalidity alleged may be of several different types, but a common type is to be seen in the suit by a Hindu reversioner challenging a widow's alienation as not

made for necessity. To rip up transactions entered into over a long period—*e.g.*, between the widow's alienation and 12 years after her death—may necessitate mass litigation of the most inconvenient kind. But before putting many heads upon one neck for the convenience of the plaintiff, the legislator will desire to consider several things. The present rules as to joinder of parties and joinder of causes of action are very wide, and in ordinary cases work not the less efficiently for their lack of scientific precision. They are taken from England—a country in which the social conditions afford little temptation or even opportunity to any one to attempt litigation against masses of people. In such cases as we are now considering the right to join all persons as defendants against whom the plaintiff alleges any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is pushed to an extreme already. The demand for simple machinery wherewith to carry it out to its logical conclusion is not necessarily reasonable: it may be sheer unreason in the garb of logic.

It seems distinctly hard upon (say) an agricultural tenant to bracket him in a class with all other persons whose right must be traced back to a given transfer executed in years long gone by. This seems to be pushing the representative principle beyond the facts as to representation. Such persons are not, like co-heirs, persons who have joined an association, or joined in taking up a series of debentures. When, as would appear in certain provinces, it becomes a common practice to challenge in one suit several different alienations made by the limited owner, and to implead everyone whose title or possession is derived under any of such alienations, the circumstance that this procedure produces extreme inconvenience is not of itself a reason for introducing new principles. We understand that the practice which we have mentioned is, according to the decisions, authorised by the Code in the case of the ultimate reversioner whose right arises on the death of the limited owner. We do not understand that the reversioner is obliged by law to take such a course. It is presumably taken in most cases because the plaintiff desires to litigate once and only once certain issues common to all the cases, *e.g.*, whether the plaintiff is the true reversioner. Now many separate suits may have issues common to them all. If the parties are not prepared by consent to treat one suit as a test case, a scheme for compelling them so to do is certainly difficult to devise. It may be a great hardship upon a defendant who may have several conclusive answers to the plaintiff's case to require him to take part with numerous other people, strangers to him, in litigating one point by itself. To require a plaintiff to prove the same thing twice or oftener against different defendants may well be the lesser evil. We are not prepared to make recommendations upon the principle that some means must be devised at all hazards to enable an issue common to the cases of many different people to be decided once for all. It appears to us a very serious question whether more good could not be done at all events in cases of this type, by further limiting the plaintiff's right to join defendants and causes of action in one suit, or by making a

more convenient rule as to what " cause of action " means in this connection. The intolerable position of a defendant, impleaded together with a multitude of other people strikes us even more forcibly than the difficulties of the plaintiff, and it is matter for consideration whether Order II, rule 6, gives the court sufficient power to protect such defendants.

12. It is necessary to compare alternative remedies. If a " concise statement " was in such cases allowed to be served under Order V, rule 2, instead of a plaint, if the system of " registered address " were enforced, if by amendment of Order I, rule 6, the court could require parties to appoint an agent for service within the jurisdiction, if on appeal it was made possible in a proper case to obtain an order dispensing with the need to substitute the heirs of respondents who took no part at the trial, some of the unnecessary trouble and expense might more safely be eliminated.

13. We have made our recommendations as to these matters. In particular we are prepared as stated in a previous Chapter to recommend that the principle of Order XLV, rule 9 (A), should be applied in India subject to the leave of the court. It is we think possible to go somewhat further on the same lines in cases where defendants are very numerous, *viz.*, to provide that after the trial has commenced it should be open to the court to absolve the plaintiff from the necessity to substitute the representatives of any defendant who did not in his lifetime file a written statement or who, having done so, did not appear to contest at the hearing. Beyond this we are not prepared to go, not having succeeded in devising any scheme or schemes which satisfy ourselves. In our opinion the " representative suit " as a device to overcome difficulties of service has a very limited application. As a device to require people to make common cause after service its utility for the purposes of particular types of suit may possibly be increased. As a device to avoid useless substitution of representatives on the death of a party the more limited experiment which we have suggested might be attempted first.

CHAPTER 47.

Codification.

1. We have found great difference of opinion in all the provinces as regards the advisability of further codification of the law. The merits and demerits of codification in the abstract have, since Bentham, been canvassed by eminent writers owing allegiance to many different schools of law. Though the advantages are perhaps more frequently exaggerated than the difficulties, it seems necessary to recognise that codification has many special advantages in India and that even in England much codification has been successfully undertaken during recent years. The earlier English codes are well-known—the Bills of Exchange Act, 1882, the Partnership Act, 1890, the Sale of Goods Act, 1893, the Marine Insurance Act, 1906. Lord Birkenhead in his book "Points of View" has described the method adopted in England by Lord Loreburn and his advisers with reference to the substantive criminal law. They decided that it was expedient to abandon the ambitious attempt to produce a complete code of law. "They determined therefore to proceed piecemeal to codify the several branches of the law seriatim so that when the process had been completed the various chapters dealing with the several branches might be incorporated in a single Act which would constitute a complete criminal code so far as substantive law was concerned." In pursuance of this policy bills dealing with Perjury (1911), Forgery (1913) and Larceny (1916), have been introduced and passed into law, and the work still goes on. The process will contrast itself forcibly in the mind of an Indian reader with that whereby the Indian Penal Code was placed upon the statute book. Ambitious schemes of codification—like the Evidence Act or the Contract Act—were necessary in order to provide a common law for India and have on the whole been justified by their results. It seems desirable to observe, however, that the grand manner is not the only manner, and that in the codification of civil law we are far removed from the conditions of the seventies.

2. Subjects as to which codification appears to be advocated are Hindu Law, Muhammadan Law and Burmese-Buddhist Law. We have found extremely little reason to think that the Muhammadan community would welcome a code of their personal law, assuming that such a code could be drawn up so as to work in practice over any large area. We know little of Burmese-Buddhist Law—much too little to be able to answer the first question which has to be considered—namely whether or not this law should be stereotyped at its present stage. So far as Hindu Law is concerned, the project of a code cannot, we think, be rejected as impracticable from a purely legal point of view, provided that the attempt is made by stages. Whether when the full meaning of codification is appreciated by the community concerned it would be found to be obnoxious to religious ideas as to the authority of sacred writings is of

course a difficult question. As to this we think that opinion varies much at present throughout India. The proposal to codify Hindu Law deserves respect if it be made in the same spirit and manner as would be applicable, *e.g.*, to a proposal to codify commercial law. We select this illustration because in the book already referred to Lord Birkenhead has most convincingly pointed out with reference to commercial law the difference between compiling a useful code and writing a text-book. This point seems to us to be of great importance. We have some excellent text-books on Hindu Law; some of them cover the whole or practically the whole field so far as text-books can cover it. But a code of Hindu Law is the work of many men for many years; a programme has to be laid down; and in the end the desirability of the code can only be judged of by the results of the attempt. The attempt if carefully made is quite likely to be successful in some branches and almost abortive in others. Hindu Law is highly logical but is of a very high degree of complication and the old principles are meeting with new social conditions so as to produce problems which the old logic does not always solve. For the limited purposes of this Committee, a recommendation that Hindu Law should be codified would be entirely misconceived. That we have made even a few observations on the subject is due solely to the consideration that slap-dash codification would do immeasurable harm. We would not willingly be understood to regard with prejudice the ultimate chances of a tentative and carefully constructed scheme, designed with due appreciation of the length and difficulty of the task. We are not prepared to suggest any particular branch of Hindu Law as capable of codification independently of other branches and as one in which codification would produce immediate special advantage.

3. Connected with this question is the question whether steps should not in some part of India be taken to codify or to tabulate some of the different types of custom which come before the courts, particularly customs as regards succession. This is essentially a provincial question, and the problem in no province is the same as in another. We were told by witnesses in the Punjab that the Punjab Customary Law should be codified; we were also told that the allegation of special custom is carried to extreme lengths. We understand that the policy recently pursued has been to compile by authority a table or register of customs and that a register of the customs of the central districts of the Punjab was published in 1922. We see no reason to criticise this policy nor can we intrude with any confidence into the discussion of Punjab customary law. We think it very probable that the necessity to bring custom within stricter limits will press more and more upon the authorities in the Punjab.

4. It has long been noticed that there is in India no code of the law of torts or civil wrongs and some witnesses urged us to recommend that such a code should be compiled. This matter has been under consideration for some years. So far as we can see, there is

no branch of the law which is more free from the blame of contributing to the law's delays. A large part of this work is done in India, and is better done, by the criminal courts. That justice quity and good conscience afford an insufficient lamp to the feet of courts in difficult cases is plainly true. We would say nothing against a proper programme of codification, save that here again the subject is wide, the success of the attempt will be very unequal in the different branches of the subject and can be judged of only when the draft code is produced.

5. For our purposes it is beyond question that the most useful recommendation to be made is that the codes we have should be revised carefully and at frequent intervals. Here there is much to be gained and daily difficulties can be removed. The best code must necessarily produce a crop of new litigation. The existing codes cover a very large area and in amending them it is possible to know within limits what one is doing. The work to be done by High Courts in keeping smooth the working of the Rules in the first schedule to the Civil Procedure Code is insisted on elsewhere in this report. The revision of the Transfer of Property Act upon which we understand that much pains have already been taken is another urgent work. The Indian Contract Act was in some respects a far-sighted statute but it was never among the best of our codes and to-day it needs amendment. The sections affecting the Sale of Goods and Partnership if they be compared with the English Acts of 1893 and 1890 will be seen to call aloud for amendment. The ideas as to public policy require revision. This statute too contains some very indifferent attempts at definition—chiefly at unnecessary definition. Several sections seem to be out of the proper order and others read like extracts from an inferior text-book. In most cases of contract—even in quite difficult cases—the right reason of the matter is clearer without the code than with it.

We have dealt elsewhere with other statutes and suggested amendments in some detail.

6. We appreciate that the constant revision of our codes must throw a quantity of work upon the Legislature which may from time to time leave insufficient room for other matters more important or less easily ignored. It is much to be wished that the special position of India in respect of its codes may receive due consideration in the constitutional discussions of the future. The necessity of systematic revision has always been admitted; the difficulties of systematic revision become greater as the statute book gets larger and new problems press for attention.

CHAPTER 48.

Bengal and Assam.

1. In Bengal there are twenty-one district judgeships and in Assam two, the total number of districts being twenty-six in Bengal and eight in Assam. In recent years, in addition to the twenty-three district judges, the average number of additional district and sessions judges annually employed has been fourteen. The number of munsifs employed on civil work has recently averaged about 254 and of subordinate judges 53; but throughout Assam, except in the district of Sylhet, and in the district of Darjeeling and part of the district of Jalpaiguri in Bengal, members of the executive service do the work of subordinate judges and munsifs in addition to their executive work. In Bengal the number of these officers is usually about five and in Assam about twenty-four. In Calcutta itself there are the sixteen judges of the High Court and seven judges of the Presidency Small Cause Court.

2. The population of Bengal is, according to the last census, 48,695,538 and of Assam 7,990,246. The population under each judgeship varies considerably. In Mymensingh the population is 4,837,000; in Dacca 3,125,000; in seven other judgeships, *i.e.*, 24-Parganas, Midnapore, Tippera, Dacca, Backergunge, Faridpur and Sylhet, the population is over 2,000,000; while at the other end of the list is the district judgeship of Birbhum, the only one with a population of less than a million.

3. A comparative statement of the average number of institutions, cases disposed of and cases pending in the different grades of district courts in the two tri-annual periods of 1912-14 and 1920-1922 is set down below:—

Bengal.

Nature of case and court.	Average number of cases instituted.		Average number of cases disposed of.		Average number of cases pending.	
	1912-14.	1920-22.	1912-14.	1920-22.	1912-14.	1920-22.
Munsifs—original suits . .	579,305	662,587	595,171	663,057	156,584	188,134
Subordinate and district judges' courts—original suits.	33,514	28,137	33,299	29,576	9,878	13,238
Regular civil appeals . .	17,809	17,040	16,975	20,438	15,052	19,036
Criminal appeals . . .	3,585	3,184	3 528	3,192	197	296
Sessions cases . . .	1,266	1,318	1,213	1,201	172	248

Assam.

Nature of case and court.	Average number of cases instituted.		Average number of cases disposed of.		Average number of cases pending.	
	1912-14.	1920-22.	1912-14.	1920-22.	1912-14.	1920-22.
Munsifs—original suits . . .	39,172	40,935	38,708	41,773	10,689	10,824
Subordinate and district judges' courts'—original suits.	1,059	633	1,072	746	384	532
Regular civil appeals . .	1,114	1,051	982	1,030	866	596
Criminal appeals	674	553	674	544	42	65
Sessions cases	227	232	228	234	27	38

It may be added that for the earlier period the numbers of whole-time munsifs, subordinate judges and district and additional district judges in the two provinces averaged 254, 48 and 33 respectively, the number at the present time being approximately 254, 51 and 37.

4. This statement shows an average increase in institutions in the munsifs' courts in Bengal of about 14 per cent. On the other hand there has been a decrease in the number of suits before subordinate and district judges but the outturn in those courts has decreased with the result that the amount pending is almost half as much as the average annual institutions. The number of civil appeals pending has largely increased. Sessions trials and criminal appeals have not increased in number; but since 1918 in Bengal (except in the districts of Darjeeling and Jalpaiguri) and practically throughout Assam most trials have been by jury and in consequence a much greater time has to be devoted to criminal work. However we look at the figures, it is clear that the present staff does not succeed in the present conditions, with cases getting more and more complicated and, when contested, being more and more seriously contested, to do much more than keep pace by disposals with the current institutions. It cannot effectually deal with the accumulated arrears of many years. The policy in Bengal, when there has been an increase at all in the judicial staff, which so far is almost negligible, has been to increase, when necessary, the number of superior courts. But this is mainly due to the necessity of having additional district and sessions judges for the trial of sessions cases, with little time to devote to civil appellate work.

5. In the Chapter dealing with the Constitution of Courts we have referred, generally for the whole of India, to many proposals that have been made for relieving district judges of some of the work which they alone can now take, by giving further jurisdiction to subordinate judges, by enhancing the powers of munsifs (which at present in these provinces normally extends only to Rs. 1,000) and by the development of village courts for the trial of simple suits in the mofussil. We have also proposed an extended jurisdiction

in certain matters to small cause courts, and an increase in the small cause courts' pecuniary jurisdiction. But whatever is done in order to put things on a footing under which in future delays may be avoided, it appears to us above all to be essentially necessary that something should be done at once to clear off the main block of old pending cases without detriment to what should really be current work. It is beyond our province to deal with increase of establishment; nor are we in a position to make any concrete proposals as to the staff required. This can only be done by the High Court after a detailed examination of the needs of each district.

6. Again, though we have recommended an extended jurisdiction for village courts where the circumstances of a province admit of it, so far as Bengal is concerned courts established under the Village Self-Government Act are only just beginning to function. None exist in Assam nor are there any yet in the heavy districts of the 24-Parganas and Midnapore. There are only 8 in the whole of the Mymensingh district, 15 in Faridpur, 10 in Hooghly, 4 in Nadia, 2 in Birbhum, 9 in Burdwan and 19 in Tippera. The only district where village courts can be said to be at all numerous is the district of Dacca where there are 90. The total number of these courts in the province is only 157 and as a union board would not cover more than 10 square miles at the most, less than 1,600 square miles is covered out of a total area of 70,000 square miles in the Province of Bengal. We cannot, therefore, expect that for many years to come village courts are at all likely to give any substantial relief in the administration of civil justice, and the court of lowest jurisdiction must for all practical purposes long continue to be that of the munsif.

7. Any proposal to enlarge the powers of munsifs in suitable cases upto Rs. 5,000 has the advantage that the increase in cost by increasing the lower grade of officers would not be so much as if the increase were made among district and subordinate judges. But any devolution which may be determined on would, if not accompanied by an increase of staff, of itself only remove the congestion from one place and put it in another.

8. Taking first the munsifs' courts in Bengal, the following statements set out for 1922 the work disposed of.

A.

Suits of all classes.

Pending from 1921		178,010
Disposed of in 1922		603,690
Pending at the end of 1922—		
Ordinary	134,310	163,761
Small Cause Court	29,451	
Pending over one year		12,892

B.

Disposals.

Ordinary—		
Contested	54,436	457,366
Uncontested	402,930	
Small Cause Court—		
Contested	12,909	146,324
Uncontested	133,415	
		603,690

C.

Percentage contested.

All suits	11
Ordinary	11·9
Small Cause Court	8·8

D.

	1921.	1922.
Average disposal for one munsif	2,730	2,454
Of which contested cases were	·311	274

E.

Disposals under ordinary procedure		457,366
		Contested.
Money or Movables	57,594	8,434
Under the rent law	335,414	32,724
Title	64,358	13,277
	457,366	54,436

F.

Duration of suits.

Ordinary—	
Contested	276 days.*
Uncontested	137 ,,
Small Cause Court—	
Contested	126 days.
Uncontested	64 ,,

G.

	1921.	1922.
Cases decided by subordinate courts in which an appeal lay	57,915	51,706
Regular appeals brought to subordinate appellate courts	15,915	13,830
or about 26 per cent. of appealable decisions—		

* Average duration in suits for possession is probably much greater.

9. In 1922 munsifs determined without contest 402,930 ordinary suits and 146,324 contested and uncontested small cause court suits. In these latter there is no appeal and they were disposed of on an average, if contested, within four months and, if uncontested, within two months—an ample but not unreasonable time. But under the ordinary procedure an uncontested suit takes longer than a contested suit does under small cause court procedure, *viz.*, $4\frac{1}{2}$ months: a contested suit takes nine months, and the decree is subject to appeal save in suits for rent under Rs. 50 before specially empowered munsifs where the rate of rent or the title is not in question.

10. Of the 402,930 uncontested suits no less than 302,690 were suits under the rent law of which about 94 per cent. were for arrears of rent and of the 54,436 contested suits under the ordinary procedure 32,724 were under the rent law. These suits congest the munsifs' courts in Bengal from May onwards in each year as regards the office and from June till October as regards the munsifs, and we have considered the question whether anything can be done to relieve the courts in respect of this mere rent collecting work. Any shortening of the period of limitation (now, four years ending with the Bengali year) would increase the number of rent suits: nor is it politic to force landlords to come to court and sell their tenants' holdings sooner than they feel inclined to do. So far as the mass of uncontested cases is concerned, it does not appear to us that any substantial saving of time would be gained by any form of procedure for summary judgment. It has been suggested that more might be done by means of the certificate procedure under the Bengal Public Demands Recovery Act, 1913. Under this Act at present the Local Government permits certain landlords who have satisfied certain conditions to obtain from the Collector a certificate which is equivalent to a decree for rent, leaving it to the tenant on showing a sufficient defence to have the certificate set aside. At present the granting of such certificates and the execution proceedings thereunder are done by deputy collectors. It has been suggested that certificate procedure might be put into the hands of munsifs and applied generally or at least be much extended. The difficulty is that cases tried *ex parte* would occupy munsifs for quite as much time under this proposal as at present. It takes only a few minutes as a rule to record the evidence of the plaintiff and scrutinize the plaint before decreeing the suit.

If a claim for rent involves a question of title as distinct from the mere question whether there exists between the parties a relationship of landlord and tenant, or if the decree decides a question as to rate of rent, then the ordinary law applies and the losing party has the ordinary rights of first and second appeals irrespective of the value of the suit. If, however, a rent suit be free from the complications abovementioned, then at present in the case of specially empowered judicial officers, there is no right of appeal where the amount decreed by the munsif does not exceed Rs. 50 or the amount decreed by the subordinate or district judge at first instance or on first appeal does not exceed Rs. 100. The relations between landlord and tenant in these permanently settled provinces

are the subject-matter of much contest and we do not feel competent as a Committee to pronounce with any confidence upon wide-reaching projects of reform. We understand, however, that the limits of Rs. 50 and Rs. 100 respectively could without much objection be raised at least to Rs. 100 and Rs. 200 subject always to the maintenance of the present exceptions as to cases where title or rate of rent is concerned. We would suggest, however, that these figures are themselves somewhat low and that the law should be so amended as to make it clear that in any case under the selected limit of value appeals should only lie upon a question of title or rate of rent.

11. The balance of contested suits under ordinary procedure is 21,711 and of uncontested 121,952, of which 57,594 and 8,434, are the figures of uncontested and contested suits for money or movables and 64,358 and 13,277 the figures of uncontested and contested title suits, a large number of which are simple mortgage suits. A certain number of the money suits are suits of low value and if some of these and the simple mortgage suits could be disposed of more rapidly by extending the powers of the small cause courts delay might be lessened. The delay in disposals could also be considerably reduced if as we propose, in simple mortgage suits one decree only has to be passed.

12. The following statements set out the civil work of the subordinate and district and sessions judges and the amount of time district and additional judges were able in Bengal to devote to civil work in 1922:—

Nature of cases.	Number of Cases.			Duration in days.	
	Instituted.	Disposed of.	Pending.*	Contested.	Uncontested.
Subordinate Judges.					
Suits—Ordinary	6,451	6,818	8,346	571	345
Small Cause Court	17,689	19,152	3,789	126	64
Regular Appeals	..	9,697	5,036	344	
Miscellaneous appeals	..	982	309	179	
District Judges.					
Suits—Ordinary	483	460	354	340	256
Miscellaneous suits	7,913	7,268	3,358	108	
Appeals— Regular	13,420	9,834	10,010	515	
Miscellaneous	3,245	2,285	1,039	112	

* Of the suits and regular appeals pending 3,160 suits and 3,754 appeals were pending over one year.

Statement showing the number of working days spent on Criminal and Civil Work during 1922 by District and Sessions Judges and Additional District and Sessions Judges in Bengal.

Division.	District.	Total number of working days employed on Criminal work during 1922 by						Total number of working days employed on Civil work during 1922 by					
		District Judge.	1st Additional District Judge.	2nd Additional District Judge.	3rd Additional District Judge.	4th Additional District Judge.	5th Additional District Judge.	District Judge.	1st Additional District Judge.	2nd Additional District Judge.	3rd Additional District Judge.	4th Additional District Judge.	5th Additional District Judge.
Burdwan	Burdwan.	102	..	..	..	..	..	132	..	..	..	..	..
	Birbhum	123	..	..	..	..	..	110	..	..	..	..	..
	Bankura	56	..	..	..	..	..	176	..	..	..	..	..
	Midnapur	65	107	78	..	..	..	187	128	106	..	..	..
	Hooghly	134	92	131*	..	..	..	100	24	111*	..	..	..
Presidency	24-Parganas	48	101	97	131	143	10	104	90	118	88	32	1
	Nadia	161	..	..	..	..	..	87	..	..	..	..	..
	Murshidabad	68	14	..	..	..	..	158	21	..	..	..	..
	Jessore	88	37	..	..	..	..	156	54	..	..	..	..
	Khulna	208	61	..	..	..	..	16	60	..	..	..	..
Dacca	Dacca	103	244(*a*)	..	..	..	..	138	154(*a*)	..	..	..	..
	Mymensingh	129	337(*b*)	..	..	..	..	92	108(*b*)	..	..	..	..
	Faridpur	140	143	..	..	..	..	65	36	..	..	..	..
	Bakarganj	226	227	174	..	..	..	47	6	1	..	..	..
Rajshahi	Rajshahi	159½	66½	..	..	..	..	80½	52½	20	..	..	..
	Dinajpur	166	32	..	..	..	..	50	65	..	..	..	..
	Rangpur	163	..	..	..	..	..	76	..	..	..	..	..
	Pabna and Bogra	193½	164	..	..	..	..	57½	61	..	..	..	..
Chittagong	Tippera	117	65	..	..	..	..	125	77	..	..	..	
	Noakhali	42	58	..	..	..	..	203	97	..	..	..	..
	Chittagong	150	62	..	..	..	..	87	32	..	..	..	..

* Additional Judge, Howrah.
(*a*) Two Additional Judges. Separate figures not shown in the Annual returns.
(*b*) Two Additional Judges. Separate figures not shown in the Annual returns.

13. Taking first the work of the subordinate judges, the statement shows that the average period required for disposal of uncontested suits is practically a year, but it must be remembered that in Bengal suits are recorded as uncontested not if there has been no contest at any stage but if they are finally disposed of without a full judgment having to be written. Thus many a case in which a defence has been entered is finally shown as uncontested. Both this figure and the figure of 571 days for contested suits are also inflated by the number of mortgage suits shown as still pending in which the preliminary decree has been passed and which are waiting for the period of six months to elapse until they can be disposed of on final decree. But apart from this, it is perfectly clear that in certain districts contested title suits take a very long time and the records show that in certain cases judgment follows long after the cases have been finally heard. In addition to hearing ordinary suits the subordinate judges in 1922 heard 9,697 appeals, district and additional district judges hearing 9,832.

14. In Bengal there used to be three subordinate judges solely engaged on small cause court work, the courts being the small cause courts of Sealdah in the suburbs of Calcutta, Narainganj, a commercial town in Dacca district and Hooghly, Serampur and Howrah, a commercial area near Calcutta. The small cause court of Sealdah which hears cases upto the value of Rs. 1,000 is fully employed on that work, a munsif as registrar helping the judge in matters of Rs. 20 and under in addition to his other work as munsif. The judge at Narainganj is able to dispose of a certain number of civil appeals in the Dacca district. The third small cause judgeship has recently been abolished and for sometime before the abolition of this special court with an expensive special establishment the judge was able to hear a certain number of appeals when sitting at Hooghly. Except for Sealdah, if our proposal to increase the jurisdiction in small causes is accepted there should be no need for any court of this nature. The work can be more satisfactorily done by the ordinary subordinate judicial service.

15. Most of the district judges, as the statement shows, have to devote a very considerable portion of their time to criminal work though no doubt in the bigger districts relief has been afforded to them by the appointment of additional district and sessions judges.

In certain districts too their miscellaneous work is extremely heavy, especially in the 24 Parganas and Dacca. Except in the 24 Parganas district where one of the additional district judges is mainly engaged on land acquisition cases, the district judges do practically the whole of the land acquisition work. This may be very heavy especially where a development of railways in a district is taking place and we noted that in the district of Burdwan there has recently been great delay in clearing off the land acquisition file.

In most of the districts in recent years district judges have been afforded shorthand-typists and where this has been done the necessity for any great delay in recording judgment is not apparent.

16. Though there are in the mufassil roughly over 340 judicial officers engaged in civil work, courts are concentrated in 108 places and the tendency in recent years has been, as far as possible, to do away with what are locally termed " chcukies " and have the munsifs' courts at headquarters, that is, at the same place as the subdivisional magistrates courts. This makes for stronger courts and a stronger Bar, and with the improving facilities of transport, complaints about distance of courts from villages are of rare occurrence. It is quite exceptional for any subordinate judge's court to sit anywhere except at the headquarters station of a district. At the present time the only one exception is that a subordinate judge, usually with the powers of an assistant sessions judge, sits at Asansol, a sub-division in the Burdwan district, the importance of which is that it is one of the two main centres of the Indian coal fields. The following table sets out the distribution throughout Bengal, including Sylhet, in 1922, temporary courts being included.

Stations with one munsif only	28
Stations with two munsifs only	29
Stations with three munsifs only	18
Stations with four munsifs only	5
Stations with five munsifs only	1
Stations with 1 munsif and 1 subordinate judge . .	3
Stations with 1 munsif and 2 subordinate judges .	1
Stations with 2 munsifs and 1 subordinate judge .	5
Stations with 2 munsifs and 2 subordinate judges .	1
Stations with 2 munsifs and 3 subordinate judges .	1
Stations with 3 munsifs and 1 subordinate judge .	4
Stations with 3 munsifs and 2 subordinate judges .	4
Stations with 3 munsifs and 3 subordinate judges .	2
Stations with 3 munsifs and 4 subordinate judges .	1
Stations with 4 munsifs and 1 subordinate judge .	2
Stations with 5 munsifs and 5 subordinate judges .	1
Stations with 7 munsifs and 2 subordinate judges .	1
Stations with 7 munsifs and 3 subordinate judges .	1

The courts of Bengal and Assam are regulated by the Bengal, Agra and Assam Civil Courts Act and under that Act the principle is that each munsif's and subordinate judge's court is given an exclusive local jurisdiction. In our Chapter dealing with the Officers of Courts we have dealt at length with the question of the advisability of appointing Registrars, to relieve district judges at headquarters and where several courts are congregated together in one place to take up the uncontested and execution work. We have there given two examples, one of the headquarters station of the Mymensingh district and the other of the Narainganj sub-division of Dacca and shown how this system would work. We lay stress on our proposals in that Chapter especially for Bengal where the number of uncontested suits before munsifs is high. We consider that this system has much to commend it as relieving those who have to try contested cases of a large amount of work mainly

of a routine character. This would involve an alteration in the Act and the abolition of the invariable rule of division of work within a district or munsifi on a territorial basis.

17. Another point on which we would lay particular stress is the necessity for more adequate inspection of all courts. At present the annual reports show that for practical purposes no High Court Judge has inspected any district court at all for years past. This is due to the stress of work in the High Court itself. District Judges too do not regularly inspect subordinate judges' and munsifs' courts under them. This, we consider, to be a great mistake and we hold that the district judges' work of inspection is as important as any of his other duties. No provision has been made requiring each subordinate judge and munsif to inspect his own office yearly. This has been tried in certain provinces especially in Behar and Orissa, with, we understand, good results. We are convinced that no system of periodical returns can adequately take the place of personal inspection.

18. Besides the delays caused by want of time, one of the other causes in many of the title suits especially in cases of alluvion and diluvion is the need for appointing commissioners to prepare maps of the lands in dispute. There are frequent complaints about the delay in execution of these commissions which are usually given to pleaders, who have passed the pleadership survey examination, the old class of civil court amins being now almost extinct as none have been appointed since the passing of Bengal Act III of 1899. In Bengal the delay may often be due in part to causes outside the pleader's control. The period of the year during which it is possible to work in the fields, *i.e.*, when the rivers are low, is short and if once the opportunity is missed owing to the negligence of the parties or for any other reason, the result will be the hanging up of the whole commission for the best part of a year. At the same time it cannot be too strongly urged that more supervision is needed to see that commissions are completed within the period fixed by the courts.

19. In Bengal and Assam there is no regular system of village officials but in recent years in certain places in Bengal union boards have been established. It is therefore impossible as a rule to use village officials to assist in the service of summons but where union boards exist we consider that as they now serve certain classes of criminal and revenue processes for which the union receives fees, it is worth considering whether similar arrangements for the service of certain classes of civil processes cannot be introduced.

20. The High Court has been pressing for a scheme of reducing the age at which munsifs shall be recruited and providing for a probationary period. This appears to be very necessary but we understand that financial difficulties in the province stand in the way of this and many other improvements.

21. We would also refer to the proposals for a general amendment of the Bengal Tenancy Act. The Committee's report with its draft bill which, however, have not yet been entirely accepted

by Government, would put on the munsifs a considerable addition to their present duties, much of this work being of a quasi-administrative character. As we have shown the munsifs are already overloaded and it is to be hoped that any changes in the law will be so carried out as not to increase the delay in these courts.

22. From the 1st March 1916 the jurisdiction of the High Court of Calcutta which had extended since 1866 not only over Bengal and Assam but also over the old provinces of Bihar and Orissa, and since 1912 over the district of Sambalpur, has been restricted to Bengal and Assam. We have dealt with some of the work in the High Court in the Chapters dealing with the Appellate and Original Sides of the High Courts and do not here repeat our recommendations.

The following statement sets out the outturn in appellate work in the High Court from 1916 to 1923 inclusive.

Appeal against	1ST APPEALS.				2ND APPEALS.			
	Remaining at close of preceding year.	Instituted.	Disposed of.	Difference between the figures in columns 2 and 3.	Remaining at close of previous year.	Instituted.	Disposed of.	Difference between the figures in columns 6 and 7.
	1	2	3	4	5	6	7	8
1916—								
Decrees	977	304	499	+195	4,401	2,711	2,793	+ 82
Orders	593	258	450	+192	193	108	240	+132
1917—								
Decrees	782	334	372	+ 38	4,319	2,716	2,695	+ 21
Orders	401	299	316	+ 17	61	128	150	+ 22
1918—								
Decrees	744	342	399	+ 57	4,340	2,836	3,405	+569
Orders	384	219	290	+ 71	89	106	140	+ 34
1919—								
Decrees	687	316	427	+111	3,771	2,810	2,767	— 43
Orders	313	236	384	+152	5	143	44	— 99
1920—								
Decrees	576	286	339	+ 53	3,814	2,085	2,749	—236
Orders	165	241	200	— 41	104	200	164	— 36
1921—								
Decrees	523	224	294	+ 70	4,050	2,616	1,343	—1,273
Orders	206	232	173	— 59	140	155	152	—3
1922—								
Decrees	453	337	308	— 29	5,323	2,705	3,548	+843
Orders	265	234	229	— 5	143	181	182	+1
1923—								
Decrees	482	263	239	— 24	4,480	2,837	3,401	+564
Orders	270	244	296	+ 52	142	188	221	+33
1924—								
Decrees	506	..	..	..	3,906	..	..	..
Orders	218	..	..	..	109	..	..	..

N.B—In columns 4 and 8 + indicates excess of disposals over institutions and — the excess of institutions over disposals. The figure in column 3 includes transfers.

It will be seen from these figures that the volume of work coming before the High Court in respect of first and second appeals has been fairly constant during the last eight years. On the whole first appeals show a tendency to decrease and second appeals to increase in number but in both cases the change is very slight. The arrears in first appeals at the close of 1923 were not much smaller than they were in 1920 though very substantially less than in 1916. From 1920 to 1922 second appeals were falling more and more heavily into arrears. At the close of 1923 the position was worse than in 1916 and very much the same as in December 1919. A heavy accumulation of arrears took place as regards second appeals in 1921 and although since then the number of disposals has substantially exceeded the number of institutions in this class of appeals the arrears are still inordinately heavy. In 1916 the duration figure for first appeals was 769 days and the average figure for second appeals, notwithstanding that 900 of them were summarily dismissed under Order XLI, rule 11, was in 1916 no less than 713. By 1923 these two figures had fallen to 606 and to 605 in the case of first and second appeals respectively. Here again the duration figure for second appeals is worse than it looks since one-third of the appeals disposed of was summarily dismissed. The competing claims upon the judge power of the court of civil and criminal Original Side work, appeals from the Original Side, appellate criminal work and appellate civil work have necessarily to be judged under the circumstances from time to time prevailing by the Chief Justice. It is both necessary and reasonable to assume that appellate civil work has been given as much of the time of the judges as was reasonable and possible. If the court is to attain a standard by which first appeals can be heard within a year or eighteen months of institution and second appeals within nine months or a year the accumulations of the past must be removed. So far the rate of reduction has been very slow; and the court, though it is fair to say that in the last two years it has quickened perceptibly, would not seem to have any chance of getting abreast of its work for a long time merely by maintaining the rate of improvement exhibited in the last two years.

CHAPTER 49.

Bihar and Orissa.

1. The Province of Bihar and Orissa was formed in 1912 by taking out of the old province of Bengal, Bihar and the Commissionerships of Chota Nagpur and Orissa and out of the Central Provinces the district of Sambalpur. The area of the Province is 82,761 square miles and the population according to the census of 1921 is 34,202,189. The number of district judgeships is twelve of which nine are in Bihar proper; there is one judgeship for the districts of Manbhum and Sambalpur, the other two judgeships being those of Orissa and of the rest of Chota Nagpur. In 1922 the permanent staff consisted of six High Court Judges, twelve district judges, twenty-seven subordinate judges and seventy-one munsifs. In addition two temporary High Court Judges, one additional district judge and one additional subordinate judge were employed throughout the whole year. When a separate High Court was established on March 1st, 1916, the staff consisted of six High Court Judges, twelve district judges, nineteen subordinate judges, sixty-eight munsifs and a few temporary officers. The number of centres where courts sit is forty-nine, there being twenty-nine munsifs in Bihar itself and twenty in Chota Nagpur and Orissa. In Bihar the Bengal Tenancy Act is in force and, as in Bengal, rent suits are tried by the civil courts. Chota Nagpur and Orissa have their own special Tenancy Acts and rent suits are tried by deputy collectors, certain classes of appeals in rent suits involving questions of title coming before the district judges. The Santal Parganas District has special treatment in its judicial arrangements, all the civil work being done by executive officers.

2. The following table gives a comparative statement of the state of the files of the district and subordinate judges' and munsifs' courts for the two tri-annual periods of 1912-14 and 1920-22:—

Courts.	Instituted.		Disposed of.		Pending.	
	1912-14.	1920-22.	1912-14.	1920-22.	1912-14.	1920-22.
Suits.						
Munsifs' Courts .	162,438	150,500	164,387	155,460	80,636	78,275
Subordinate Judges' and District Courts.	8,656	10,241	9,099	10,952	3,301	4,361
Ordinary.						
Civil appeals . .	7,864	8,553	7,456	8,532	5,666	6,055
Criminal appeals .	1,929	1,688	1,914	1,652	80	119
Sessions cases . .	633	570	611	578	86	108

It will be seen from this statement that litigation on the whole has fallen in the munsifs' courts and the number of criminal cases has decreased. On the other hand there has been an increase in the number of suits before the subordinate judges and district courts and in the civil appellate work. In 1922 out of 8,451 appeals from decrees decided in the district courts 4,794 were decided by subordinate judges and 3,657 by the district judges.

3. The average duration of suits is better than in several other provinces. In munsifs' cases the average duration in 1922 was 207 days for contested ordinary cases and 110 for uncontested; and in small cause court cases 79 for contested and 53 for uncontested. In the subordinate judges' courts the duration of contested ordinary cases is shown as 384 and uncontested cases 263: in the small cause court the figures are 90 and 71 respectively. The number of original suits tried by district judges is small. In 1922 there were only 182 cases before them of which 119 were disposed of, the average duration for contested cases being 372 and for uncontested 189. Appeals in district courts averaged 235 days for disposal.

4. Coming to the High Court it would be most convenient to set out the civil appellate work done in the first year of the Court and the work done in 1923.

Civil appellate business disposed of in the High Court.

Nature of appeals.	Remaining at the close of the previous year.	Brought before the Court during the year.	Disposed of.	Remaining at the close of the year.
1916.				
First Appeals—				
From Decrees	725	215	326	614
From Orders	255	202	277	180
Second Appeals—				
From Decrees	1,657	1,607	1,830	1,434
From Orders	87	135	151	71
1923.				
First Appeals—				
From Decrees	745	242	242	745
From Orders	90	220	196	114
Second Appeals—				
From Decrees	2,303	1,468	1,473	2,298
From Orders	81	99	95	85

It will be seen from these tables that the pending work in 1923, especially in second appeals, has increased, but we understand that extra assistance is being given to keep pace with the present work. The courts sits at Patna, but periodically two judges are deputed to Cuttack to hear appeals arising in Orissa.

5. An Act has recently been passed by the Local Council whereby village courts can be established. It does not appear that anything much has yet taken place in consequence of that Act nor can we anticipate that any relief can be given to the regular courts for many years to come by honorary courts. We have referred to the scheme for village courts in this province in our chapter dealing with that subject.

6. Except in the case of subordinate judges' and district judges' civil work there does not appear to be any great delay in disposals. In recent years the staff of subordinate judges has been increased in order to cope with the extra work. It would appear from the statement we have set out above that criminal work has decreased. In only one district is the jury system in full force and in nine other districts it is only partially in force. The extra work therefore which the jury system entails is not so great as in Bengal.

7. One of the rules of the High Court is that each district judge, subordinate judge and munsif must annually inspect his own office—a salutary system as useful inspection is of real help to a district judge and a poor inspection tells him when a better inspection is needed. The district judges do a certain amount of inspection of courts subordinate to them and there have been regular inspections by the judges of the High Court. This is doubtless one reason for delay being less in this province than in some others.

8. The number of stations in Bihar and Orissa in which a large number of courts are concentrated at one place is small. Such stations are only the headquarters stations of the larger districts. Except at the headquarters stations of districts in no place are more than two courts stationed; but at both Patna and Chapra there are eight subordinate courts, at Gaya seven, at Agra and Cuttack six, and at Muzaffarpur, Bhagalpur and Monghyr five. A system of registrars, to which we have referred at length in Chapter 9, might well prove useful in some or possibly all of these districts.

9. Recently an arrangement has been come to to reduce the age at which pleaders are recruited for the judicial service and provide for their having a probationary period before they actually commence work. This is an innovation which should do much to avoid the lack of administrative experience from which munsifs on first joining suffer.

10. In Bihar the mass of rent suits are filed in September at the commencement of the Fasli year and the heavy rent work therefore takes place about the turn of the year. This makes a comparison of the annual returns with those of Bengal difficult, as while in the latter province most of the smaller rent suits are disposed of within the judicial year in which they are filed, in Bihar this is not so.

We are told that it is not common to invest munsifs with summary powers under section 153 of the Tenancy Act. It seems desirable that further use should be made of this power.

We are informed that in order to reduce delay in the disposal of rent suits there is a general practice that in suits of the same village where the landlord is the same and the same set of village papers are produced munsifs take all the evidence in all the cases at one time and when they come to write their judgments take each case separately for the purpose of judgment only, saving of time which we appreciate.

11. There are two points about the service of processes in this province which may be specially referred to. The general system of requiring an identifier prevails in the district courts but in cases coming before the High Court no affidavit of service is required. Also on the processes issued to the peons a note is made of the name of the village in which the identifier who is to accompany the peon is to be found.

12. The High Court has recently issued two general circular orders as to pleaders taking evidence on commission condemning the habit of permitting a vast mass of irrelevant matter in evidence taken by pleader commissioners and they require all judicial officers to exercise effective control over the commissioners. It has been suggested to us that it might be possible to appoint munsifs as commissioners in important cases so as to check irrelevant examination and cross-examination.

CHAPTER 50.

Madras.

The heavy pendency in subordinate courts and the falling off in the work turned out by district judges have in recent years attracted no little attention in Madras. The Civil Arrears Committee (1922) and the Judicial Retrenchment Committee (1923) went into the question of speeding up work in civil courts; and quite recently (October 1924) Mr. G. H. B. Jackson, I.C.S., was placed on special duty to report on the relief required to the civil courts in the presidency. The state of congestion of work which prevails in all courts in the districts can easily be gathered from a perusal of the following statement:—

Original Suits.

Courts.	Suits instituted.		Suits disposed of.		Total pending.		Pending over one year.	
	1921.	1922.	1921.	1922.	1921.	1922.	1921.	1922.
District munsif . .	113,416	106,184	121,403	116,878	60,076	52,559	12,941	11,990
Subordinate judge. .	3,506	3,058	3,568	3,748	4,420	4,159	1,793	2,046
District court . .	589	532	288	391	548	625	148	208

This discloses a state of affairs not capable of being easily set right without some scheme for at once getting rid of the incubus of arrears, represented by a very large number of suits more than a year old. It has to be noted here that the arrears represent the actual civil litigation in the regular courts, excluding the large mass of petty litigation which goes before village tribunals and the rent suits which go before the Revenue courts. In this respect the situation in Madras is different from that in the province of Bengal—as in the latter province the congestion is in no small measure caused in the munsifs' courts by the large volume of rent suits. The arrears in the appellate work of district and subordinate judges' courts in Madras also shows an increase, the actual number of appeals pending in the former being 9,108 and in the latter 2,918. The average duration of original suits and appeals was also high in many districts. Most of the suits and appeals over one year old are of a difficult and complicated character.

2. The following summary of recommendations made in 1922 by the Civil Arrears Committee to remedy this unsatisfactory condition of things is worth reproducing here not only because it embodies some of the proposals we are making for the quick and efficient disposal of civil litigation in the whole of India but also because it draws pointed attention to the special problems arising for solution in Madras:—

"(1) The immediate increase of the number of sub-judges and district munsifs temporarily for one year to clear off the existing arrears and to bring down the file to the normal.

(2) The immediate examination, court by court, of the normal file and the normal disposal so as to arrive at an average for each court.

(3) The immediate examination of the file in each of these courts for the purpose of redistribution so as to give each court as far as possible an equal quantity of work.

(4) After the file is reduced to the normal and the number of courts and judges fixed, a certain addition to be made to the cadre to afford relief under exceptional circumstances or in heavy courts which, however, do not admit of two judges.

(5) Investing, where local conditions permit, district munsifs of eight years' standing and above with small cause jurisdiction up to Rs. 200, so as to cut down the number of appeals as well as the time required for original trial.

(6) A consideration of the question of granting appellate powers to the existing courts of small causes presided over by sub-judges.

(7) An examination of the need for a sub-court at Chittoor and the need for a district judge at Anantapur and Tanjore (East).

(8) After the files are reduced to the normal, for a more efficient and quicker disposal of suits, the Committee make the following recommendations:—

(*a*) The first hearing of a suit should be a real hearing and not a formal hearing, as it is now in most of the courts. At or before the first hearing the following matters should be looked into:—

(*i*) Whether the pleadings are precise and if they are not, they should be made precise by striking out irrelevant or unnecessary matters and by amendments where the pleadings are obscure.

(*ii*) The real matter in dispute, whether questions of fact or law, should be sifted and issues narrowed down only to those points.

(*iii*) The examination of the documents filed and oral examination, if necessary, of the parties or pleaders for the purpose of ascertaining the real matters in dispute.

(*b*) All questions relating to the constitution of the suit such as misjoinder, non-joinder and multifariousness should be disposed of at the first hearing.

(*c*) Obvious or clear questions of law which will go to the root of the case or render unnecessary trial of many of the issues of fact should be framed as preliminary issues and disposed of.

(*d*) Judicious encouragement of resort to the provisions of law as to discovery, interrogatories and admissions of facts.

(*e*) Careful posting of cases so as to enable the parties to be ready at the time when the case is posted for hearing and also to enable the court to dispose of the work posted for the day on the day on which it is posted.

(*f*) Every case should be tried on the day on which it is posted. When once the trial is begun there should, as far as possible, be no adjournment except for unavoidable causes in the interests of justice.

(9) The recommendations as to more efficient and quicker disposal are already embodied either in the Civil Procedure Code or by Rules framed by the High Court. In order to enforce their obedience closer supervision by district judges over munsifs' courts and by the High Court over district courts and sub-courts is necessary."

3. The Judicial Retrenchment Committee in 1923 supplemented these recommendations by certain proposals for devolution of powers on the lines suggested in Chapter 7 of this report and observed as follows with regard to the reduction of the process-serving establishment in mofussil civil courts and to the measures necessary to be adopted for preventing concentration of courts in one and the same station.

"The Committee, however, thinks that it is possible to reduce the process service establishment in the mofussil by the adoption of the following among other methods:—

(1) The writing and filing of processes by the parties themselves instead of their being written by process-writers attached to each court; the clerical establishment of the court should scrutinise the processes before issue.

(2) Emphasising the power of courts to order witnesses to attend on the adjourned date of hearing without fresh summonses for such attendance.

(3) The handing over of witnesses' summonses to the parties themselves at their option for service on the witnesses subpœnaed by them.

(4) Increasing the minimum of processes to be executed by process-servers and amins with due reference to the facilities of communication, the distance to be travelled and so on."

"The Committee considers that the location of a large number of courts in one and the same station is not desirable as it gives rise to concentration of work in the hands of a few leading pleaders and to frequent adjournments in consequence. Courts should, wherever practicable, be located in the area from which the litigation which they have to deal with comes and not at any considerable distance from such area."

"The Committee would also suggest that in cases where a new court is to be located in a station which has already got a court of co-ordinate jurisdiction, no additional staff on the scale now allowed for temporary courts should be sanctioned but that the staff of the existing district munsif or sub-judge should be made to do the work of the new court with such additional relief as may be necessary. The clerical work of the new court should be carried out on this footing until the bill already referred to in paragraph 6 becomes law."

4. In pursuance of the recommendations of these Committees a number of new subordinate courts and munsifs' courts were opened; a bill to amend the Madras Civil Courts Act has been introduced, to provide for attaching additional or joint judges to existing courts, to relieve congestion and to increase the ordinary and small cause powers of district munsifs; subordinate judges have all been invested with jurisdiction under the Succession Certificate, Land Acquisition and Insolvency Acts; orders have been issued abolishing the salary of official receivers and sanctioning a revised scale of remuneration to them. The Hon'ble Mr. Justice Wallace has, we understand, formulated a scheme according to which a permanent official may be appointed in any district where the volume of work will justify it, as trustee of minors' estates, administrator of Intestate and Testate successions and official referee.

5. The main object of the bill to amend the Madras Civil Courts Act recently introduced in the Madras Legislative Council is the appointment of more judges than one to one and the same court of subordinate judge or district munsif. The proviso to section 10 of the existing Act empowering the district judge to assign jurisdiction to subordinate judges is replaced in the amending bill by a provision vesting such power in the High Court, no other Civil Courts Act giving such power to the district judge. There is, however, no provision for the court of "additional judge" similar to that in the Bengal Act which is as follows:—

"When the business before any district judge requires the aid of additional judges for its speedy disposal, the Local Government upon the recommendation of the High Court, may appoint such additional judges as may be requisite. Additional judges so appointed shall discharge any of the functions of a district judge which the district judge may assign to them and in the discharge of those functions, they shall exercise the same powers as the district judges."

A similar provision in Madras will be of great use in the disposal of the appeals between Rs. 3,000 and Rs. 5,000 that are pending for long periods in some districts, because they have to be heard by district judges. A senior subordinate judge, specially selected for this purpose and appointed as additional district judge or joint district judge will be in a position to clear these arrears with reasonable despatch. We see no necessity to increase the work of the High Court by providing that all appeals from the decrees of subordinate judges should lie to it. The pecuniary jurisdiction of

munsifs which was fixed in 1916 as not to exceed Rs. 3,000 might now, we think, be raised to Rs. 5,000 in selected cases. Wherever the jurisdiction extends to Rs. 3,000, or less than Rs. 5,000, an "additional district judge" may be appointed to hear appeals against the decisions of the subordinate judge. The appointment of such additional judges will, in many other ways unnecessary to be detailed here, help greatly to relieve congestion in many of the principal civil courts in the province.

6. We note from the Objects and Reasons of the bill under consideration that the Government are disposed to raise the small cause jurisdiction of subordinate judges to over Rs. 500 but are not taking up the change now as it would involve difficulties of appeal and an amendment of the Code of Civil Procedure. We wish, however, to point out, having regard to our recommendations in Chapter 7, that action should be taken under the clause (3) of section 15 of the Provincial Small Cause Court Act, IX of 1887, in suitable areas by directing selected senior subordinate judges to take cognisance of suits of over Rs. 500 in value. The High Court might be authorised to invest district munsifs with powers up to Rs. 500 and subordinate judges up to Rs. 1,000 by amendment of section 28 of Act III of 1873. We fail to see that there is any difficulty in this owing to the Civil Procedure Code. It is done in Bombay. We make these suggestions to enable the Local Government and the High Court to act when occasion arises so as to extend the jurisdiction of small cause courts to the full limit prescribed in the Provincial Small Cause Court Act. At present all district munsifs exercise small cause jurisdiction up to Rs. 100 and sub-judges have small cause jurisdiction up to Rs. 500. District munsifs of 7 years' standing may be empowered with extended small cause jurisdiction up to Rs. 200. The Judicial Retrenchment Committee recommended the enhancement of these powers of district munsifs up to Rs. 300 and having regard to the satisfactory way in which these powers have been exercised, the present opportunity of amending the Civil Courts Act might be availed of to extend the small cause powers of district munsifs to Rs. 500 and subordinate judges to Rs. 1,000.

7. We understand that the recommendations of the Civil Arrears Committee regarding the examination, court by court, of the normal file and normal disposal and the redistribution of territorial jurisdiction of courts were referred to the Judicial Retrenchment Committee who, however, reported that they were unable to make any recommendation without inspection of mofussil courts. Mr. Jackson, who was placed on special duty in connection with the first of the above two points has, we understand, submitted his report which is now before the Madras Government. We also understand that the territorial distribution of courts has received recent attention from the High Court. It is beyond our province to inquire into the strength of the judicial establishment; we may, however, observe that the work in munsifs' courts does not seem to be unmanageable with the existing cadre, the pendency being in

most cases less than 50 per cent. of the institutions, and that all that will be necessary in their case is a readjustment of territorial jurisdiction and posting of suitable officers according to the standard of work fixed for each court. Moreover there has been a fall in the institutions in these courts partly owing to the effect of the enhancement of court-fees under Madras Act V of 1922 and to the growing popularity of village tribunals and the co-operative movement.

The total number of suits pending in subordinate judges' courts was 4,159 at the end of 1922 of which 2,046 were over one year old. These one year old suits have doubled themselves during the past five years. The district courts show no better record. The percentage of pendency to institutions both in original suits and in appeals in district courts is very high and that of disposal to institution is very low. In some districts it is hopeless to expect any improvement unless immediate relief is given to the existing courts in at least clearing off the accumulated arrears.

8. The present standards of work of the various courts are fixed for the whole presidency much in the following manner:—

	ORIGINAL SUITS.		S. C. SUITS.		APPEALS.		CRIMINAL WORK.		
	Contested.	Uncontested.	Contested.	Uncontested.	Contested.	Uncontested.	Sessions.	Appeals.	Revisions.
District judges .	14	4	..	..	209	5	54	62	22
Sub-judges .	53	21	260	559	121	7	..	..	..
District munsifs	359	377	264	1,101	..	..	..	..	..

In practice, however, disposals vary widely owing to the fact that in certain areas litigation is much tougher than in others and also of course owing to the personality of the presiding officer. It is obvious that no standard of comparison can be laid down for the whole presidency for estimating the nature of litigation in each court. The comparative lightness or heaviness of a court will depend not on its file as compared with the average of a file of a court for the whole presidency, but on the nature of its own litigation and its capacity to deal with it in a reasonable time. The average disposal of a court calculated for a period of ten or twelve years during which there would have been at least three transfers of the presiding officers of varying calibre and disposing capacity may be regarded as the normal disposal of work. Even so, however, a change in the character of the work of certain courts may well take place during the immediate future. Such an estimate, as we have referred to, will, however, have great uses and would facilitate an equitable distribution of work among the existing courts. We do not feel called upon to express our opinion as to the best or most economical agency to be employed for this purpose, but we desire to emphasize the desirability of having such

an estimate prepared. The courts may be divided into different classes according to the nature of the litigation coming before them, some to be presided over by senior officers with higher small cause powers and others by beginners and officers gaining experience in judicial work with ordinary small cause powers.

9. The difficulty experienced in transferring senior officers and finding suitable substitutes for them is at present not inconsiderable. District munsifs are transferred every three years and subordinate judges every five. The transfers are generally made either during the summer vacation or during the Christmas holidays. Work in such cases is thus not much interfered with. Work, however, does suffer by the promotion of subordinate judges to act as district judges and of district munsifs to act as subordinate judges, and by vacancies caused by short periods of leave. In the case of vacancies caused by promotion it means that one of the most senior men in the cadre is taken away and his place is filled by a junior. The disturbance is greater in the case of district munsifs promoted to act as subordinate judges as such men are almost certainly exercising *extended small cause* powers, which cannot be conferred on the officers appointed to act for them. Similar difficulty is experienced in filling short leave vacancies.

These difficulties will be avoided if the rule is strictly observed that for a particular class of courts, determined by the standard fixed after examination of the work of each court, officers with increased small cause powers and experience of judicial work be posted and if the presiding officers are appointed, according to their training and capacity, to *light*, *middling* or *heavy* courts. The highest small cause power may be given even to the acting man so that small cause suits may be filed as such, but those which are contested should be reserved by administrative orders for disposal by a suitable successor with the requisite small cause powers when and as soon as appointed. On transfers of senior munsifs promoted to acting vacancies in subordinate judges' courts, it is advisable to post them on their return (till they go out again) as additional munsifs in order that there be as little dislocation as possible in the normal work of the district munsif court. Likewise in the case of subordinate judges who revert temporarily after acting as district judges, they may be asked to do appellate work as additional judges so that there could be no possiblity of heavy suits being adjourned or transfers happening in the midst of the trial of a part-heard suit. In posting officers to courts either during periodical transfers or on promotion, care should be taken to see that only officers having a colloquial knowledge of the vernaculars of the area should as far as possible be chosen. It is not conducive to speedy and satisfactory administration of justice that a Tamil or Telugu in Malabar, a man from Kanara in the Andhra country, or an Andhra in the Tamil country should grope his way in following the oral evidence or construing the documentary evidence.

10. The location of a large number of courts in one and the same station, is regarded as undesirable in Madras. The Judicial Retrenchment Committee has drawn attention to this in one of its recommendations referred to in paragraph 3 above. In the following places there are more than three courts working:—

Place.	District courts.	Small Cause court.	Sub-judges.		District munsifs.		Total.
			Permanent.	Temporary.	Permanent.	Temporary.	
Trichinopoly .	1	1	1	1	2	2	8
Cocanada . .	..	..	2	..	1	1	4
Kumbakonam .	..	1	1	..	2	..	4
Bezwada . .	..	..	1	1	2	..	4
Masulipatam .	1	..	1	1	2	..	5
Madura . .	2	..	2	3	2	..	9
Tanjore . .	1	..	1	1	1	..	4
Tinnevelly . .	1	..	1	1	2	..	5
Calicut . .	1	..	1	..	1	1	4
Coimbatore . .	1	..	1	2	1	1	6
Guntur . .	1	..	1	1	1	1	5

The concentration of courts at Madura is due to the fact that the Ramnad headquarters are also located there. There are no fewer than 5 subordinate courts there and the congestion in them and the pendency of old suits is very bad. We understand that this is receiving consideration. Whether further decentralisation is practicable in other cases is a question involving local knowledge.

11. The Civil Arrears Committee was of opinion that the provisions of the Civil Procedure Code and the rules framed by the High Court for the efficient and quicker disposal of judicial business could be enforced only by closer supervision by district judges over munsifs and by the High Court over district and subordinate courts.

It was represented to us in Madras that inspection as now made is not adequate. District judges are supposed to inspect all or the greater part of the courts in their jurisdiction each year. This is a matter that is commented on in the annual administration reports. Copies of the inspection reports are sent to the High Court and laid before the Judge in charge. District judges also submit quarterly reviews of the work turned out by subordinate judges and district munsifs. We understand that there is some prospect that one Judge of the High Court may shortly be deputed to inspect subordinate courts.

The number of district munsifs' and subordinate judges' courts inspected during the year 1922 was 168 out of 233 courts in the districts.

Village court records have to be inspected by district munsifs and 142 munsifs inspected the records of 3,631 village courts.

These village courts are growing in importance and attracting a large number of small cause suits from the regular courts. The number of suits filed before these courts rose in 1923 to 221,883.

As the number of these courts increase, their work has to be carefully scrutinised so that their popularity is not in any way impaired.

12. Although the civil courts are in general the tribunals to determine questions of title, Revenue courts, in cases under the Madras Estates Land Act (1908, as amended in 1909), determine questions between landlord and tenant except in the district of Malabar and the portion of the Nilgiri District known as the South-East Wynad. Appeals under the Act lie to the district court or to the district collector according to their nature. Second appeals from the decisions of the collector lie to the Board of Revenue and from the appellate decisions of the district court to the High Court subject to the rules as to second appeals, such appeals however not being barred by the provisions of section 102 of the Civil Procedure Code. This provision of two sets of appellate tribunals, often in respect of different issues in the same suit, is a source of much delay in the disposal of suits.

Under section 206 the Local Government may invest any revenue or judicial officer with all or any of the powers of a collector for any area in respect of suits and proceedings under the Act, and under section 207 appoint an officer in addition to the district collector to exercise all or any of the powers of a district collector under the Act. The following statement shows the volume of litigation which is handled by these revenue courts, which have been constituted in almost all the districts in the presidency:—

Year.	Instituted.	Disposed of.	Pending	
			Total.	More than 3 months.
1920 . . .	26,730	22,028	13,404	8,337
1921 . . .	24,229	28,267	10,378	4,789
1922 . . .	18,579	17,173	10,019	4,350

13. We understand that the consideration of the proposals of the Judicial Retrenchment Committee for the reduction of the process-service establishment in the mofussil and the opinions of judges collected thereon has been deferred pending our report. The whole question of improving process-service has been dealt with in Chapter 10 of this report.

14. There has been a steady increase of institutions in the Presidency Small Cause Court and notwithstanding a substantial

increase in disposals the number of pending suits has continued to rise and some of them, we understand, are old ones. The increase is remarkable in the number of suits of the value of over Rs. 500 and Rs. 1,000 and of contested suits heard by the judges, as will be seen from the following table:—

Year.	Over Rs. 500.	Over Rs. 1,000.	Contested suits.
1918	576	322	1,401
1919	601	309	2,457
1920 . . .	703	331	1,716
1921	937	463	1,829
1922	929	479	2,634
1923	1,092	535	2,656

Since 1920 the jurisdiction of the presidency small cause court has been materially added to by the City Municipal Act (Act IV of 1919) and the City Tenants Protection Act (III of 1922). Taxation cases under the former Act and ejectment cases under the latter take up as much time as, if not more than, contested cases. The Land Acquisition cases add to the work of the Chief Judge. We endorse the recommendation of the Judicial Retrenchment Committee suggesting the inclusion of the post of registrar in the cadre of district munsifs and the appointment of a deputy registrar. Improvements in methods have been suggested for this and other Presidency Small Cause Courts in Chapter 17 of this report. In particular we would urge that the registrar or registrars should dispose of all uncontested work and all cases up to Rs. 50. We have also dealt with the question of new trial application, revisions and appeals; and in particular with the composition of the bench which hears new trial applications.

As a matter of practice the judges in this court are all taking notes of evidence, copies of which are available to the parties. The points stated at the trials are also fully stated and in important cases the reasons are given for the decisions even on questions of fact, though the judges are not bound to do so.

15. The arrears in the High Court both on the Original and Appellate Side are very heavy. On the Original Side as soon as a case is ripe for hearing, it comes into the general list. After it comes into the general list it takes from 18 to 24 months before it comes into the daily list and we understand that no part of the delay thus caused can be attributed to the parties. On the Appellate Side things are even worse. From a statement prepared by the registrar of the High Court it appears that on the 31st July 1924, there were pending 1,244 first appeals from districts, 138 Original Side appeals, 167 City Civil Court appeals and 3,554 second

appeals, besides miscellaneous appeals and revision petitions. A large percentage of them was ready for hearing and more of them were capable of being made ready by expediting the printing. Those which are ready for hearing do not come up for hearing, because earlier suits have to be disposed of. Printing, no doubt, takes a much longer time than one would like. But there is no object in expediting printing when hundreds of appeals in which printing has been completed are still remaining unheard. We are told that the first appeals now pending represent work for five or six benches for one year, second appeals work for three judges for one year and the miscellaneous work six months work for a bench and one and a half months for a single judge. In addition to this there were 1,331 suits and 1,518 insolvency petitions pending on the Original Side. The suits represent work for about a year and a half and insolvency considerably more. Two additional judges were recently appointed and we hope the arrears in the highest court in the presidency will soon show a visible decrease.

From the beginning of 1924 second appeals of any value are being heard by a single judge, an arrangement which, we understand, was necessitated by the congestion of work in the High Court. This we regard as an unfortunate arrangement and we have discussed the question in connection with Letters Patent appeals. Now that additional judges have been appointed, we trust that it will be practicable to give to the second appeals of higher value a bench of two judges.

16. We have already referred to the recommendations made by the Civil Arrears Committee that certain rules of procedure relating to the trial of suits should be strictly observed. There are, however, certain respects in which the Orders and Rules in the 1st Schedule to the Civil Procedure Code appear to be giving special difficulty in Madras. We refer to them here because we are satisfied that in the case of this province there is need that they should receive attention under the rule making power of the High Court. We have not thought it necessary to suggest that all High Courts should deal with these matters because we are not satisfied that in other provinces the same difficulties are being felt. In this connection we would invite attention to Order XII, rule 6 and Order XV, rule 2, and suggest that they should be used more frequently than at present. It is desirable to give powers to courts to act under Order XII, rule 6, *suo motu*, thus obviating the delay now caused by dishonest pleas of part payment made with intent merely to prolong the trial of suits and thereby gain time to pay even the admitted amounts or by one dishonest defendant's plea making it possible for the claim admitted by other defendants not to culminate in a decree immediately. We are told that some doubt has been felt as to whether even after a judgment is passed under these rules the plaintiff can obtain an executable decree till the suit is wholly disposed of. The doubt should be removed by a suitable amendment of the rules so as to enable a decree being drawn up for the admitted claim or against the admitting defendants and execution

being allowed thereof without waiting till the final disposal of the rest of the claim.

We would also invite attention to Order XVIII, rule 2, clauses 1 and 2 which run thus:—

(1) " On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove."

(2) " The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case."

This has been interpreted to mean that the " other party " is entitled to say that he will not produce his evidence even if one witness of no particular importance has to be examined in possibly a formal matter by the party having the right to begin. This often leads to unnecessary adjournments and prolongation of trials. We would suggest that the court must have a discretion to call upon the other party to proceed as under clause (2), in such circumstances notwithstanding that a witness or two might still remain to be examined.

Order XIII, rule 9, runs thus:—

(1) " Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same,—

(*a*) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

(*b*) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of:

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so:

This rule has created trouble: under the rule as it stands, when a witness who has produced a document in obedience to the summons of a court wants its return earlier than the time limited by the rule he has to deliver to the proper officer the certified copy to be substituted for the original. There is no provision for the Court ordering the payment of the cost of obtaining such a copy by the party at whose instance the document is produced. The consequence of this is to create a disinclination in the mind of wit-

nesses to produce documents and make them put forward frivolous excuses for not producing them. This leads to unnecessary adjournment and delay. If the Court can compel the party to pay the cost when the document is exhibited for the preparation of its copy and visit disobedience of its order with the penalty prescribed by Order XVII, rule 3, much of the inconvenience now felt can be avoided.

CHAPTER 51.

Coorg.

The province of Coorg forms a single district with an area of 1,582 square miles, comprising 328 villages, and a population of 169,838 souls, Mercara being the chief city. Civil justice is being administered by a commissioner (district judge), a subordinate judge, assistant commissioner and two munsifs. The Judicial Commissioner is the highest civil court.

For the purposes of the Indian Press Act the High Court of Madras is the High Court for Coorg, which is a scheduled district. For all enactments relating to the civil jurisdiction for the time being in force the court of the Judicial Commissioner is deemed the High Court for the province of Coorg.

The jurisdiction of munsifs extends to all original suits of the value not exceeding five hundred rupees, but may be extended to one thousand rupees. The jurisdiction of an assistant commissioner extends to suits of the value not exceeding three thousand rupees and the jurisdiction of the subordinate judge and commissioner to all suits.

Munsifs may be invested with small cause jurisdiction up to any amount not exceeding one hundred rupees.

Subject to any law for the time being in force appeals lie from the decrees and orders of district munsifs in original suits and proceedings to the Commissioner who may refer them for disposal to the subordinate judge. Appeals lie to the Commissioner from all decrees and orders of the assistant commissioner in original suits and proceedings and from decrees and orders of the subordinate judge in such suits and proceedings of which the amount or value of the subject-matter does not exceed three thousand rupees. Appeals lie to the Judicial Commissioner from decrees and orders of the subordinate judge of which the amount or value of the subject-matter exceeds three thousand rupees and from all the decrees and orders of the Commissioner. Notwithstanding anything contained in section 101 of the Civil Procedure Code the Judicial Commissioner may admit second appeals against appellate decisions of subordinate judges and commissioners reversing or modifying a decree or order of the court of original jurisdiction. Notwithstanding anything contained in section 102 of the Civil Procedure Code a second appeal lies in any suit of the nature cognizable by a small cause court if the value of the subject-matter in dispute exceeds three hundred rupees.

The resort to civil courts is steadily increasing, judging from the figures for the last decade. The number of suits filed in 1922 was 2,979 as against 2,688 in 1921. Though the volume of litigation is small for the five civil courts, yet there were 560 suits pending as against 368 in the previous year. But this pendency is not very much more than what it was in 1918 to 1920 and is

hardly 20 per cent. of the total institutions. There has recently been a rise in the value of suits, the figures for 1922 and 1921 being Rs. 3,24,702 and Rs. 2,68,405 respectively. This rise, however, is not extraordinary having regard to the fluctuation in the value of suits during the past ten years, the figures for 1915, 1916 and 1919 being very much higher than that of 1922. Of the total number of suits 2,158 were small cause suits instituted in munsif's courts. 778 original suits were before munsifs and 43 before the subordinate judge. A little more than 8 per cent. of the suits related to title or other suits not being claims for money or movable property. Not more than four suits were of the value of over Rs. 5,000. The number of appeals before the district judge and the subordinate judge was 36 and of those before the Judicial Commissioner 23. Out of this latter number 17 were from appellate decrees.

There were 5,867 applications for execution for disposal in 1922, of which 1,597 were pending at the end of the year, and in so many as 3,375 applications no recovery was effected. No explanation is given for more than 70 per cent. of these applications proving infructuous.

The quarterly and annual returns are scrutinised by the commissioner (district judge) who also inspects the subordinate courts.

The Bar was composed of eleven first grade pleaders and seven second grade pleaders.

The Committee did not visit this province.

CHAPTER 52.

Bombay.

1. The territory, subject to the jurisdiction of the High Court of Bombay covers an area of 77,275 square miles with a population of 15,859,502 inhabitants. There are 15 judicial districts in the province and the total judicial staff consists of 9 High Court judges, 15 district judges, 2 joint judges, 10 assistant judges including two under training, the chief judge and 4 judges of the Presidency Small Causes Court, 2 Provincial Small Causes Court judges, 22 first class subordinate judges and 107 second class subordinate judges.

2. The total number of suits instituted in the civil courts in the province in the year 1922 was 157,099 and the total number decided was 155,120. The statistics of civil litigation in the province show that there was a steady rise in institutions from the date of the constitution of the High Court to the end of the last century and since then the institutions have been steadily dwindling. The average number of institutions per annum for the 10 years ending 1890 was 166,934; for the 10 years ending 1900 the average was 191,658; for the year 1901 the number of institutions was 186,408, while for the year 1904 it was 160,503 and the average for the ten years ending 1920 was 160,342.

A remarkable feature of the litigation of the province is the relatively large percentage of contests. The proportion of contests in Bengal is approximately one out of every ten, in the Central Provinces and Berar one out of every five, in the United Provinces, the Punjab and Burma one out of every four in Madras one out of every three, while in Bombay it is more than one out of every three, the percentage being 36·61 contested suits for every 100 suits decided. The result is that while the province ranks fifth among the provinces in the scale of institutions, it ranks third in the scale of contested decisions.

3. The constitution and jurisdiction of the civil courts in the mofussil in the Presidency are governed by the Bombay Civil Courts Act XIV of 1869 as amended by Bombay Act I of 1900. Besides the courts governed by that Act there are the following courts exercising civil jurisdiction in the Presidency:—

1. The court of the Agent for the trial of suits against Deccan Sirdars.
2. Courts of Jagirdars and of Saranjamidars.
3. Courts of Mamlatdars.
4. Village Munsifs.
5. Small Cause Courts.

The outstanding feature of the Bombay Civil Courts Act is that it does not recognise the court of munsifs and the lowest grade of judicial officers whom it recognises is the court of second class subordinate judges, who on first appointment are invested with and

immediately exercise powers to try suits up to a pecuniary limit of Rs. 5,000. First class subordinate judges exercise an "ordinary" and a "special" jurisdiction, trying in the former capacity suits under Rs. 5,000 and in the latter capacity suits of an unlimited value over Rs. 5,000. The result is that there is here no distinction as there is in the rest of India between suits triable exclusively by munsifs or officers of corresponding rank and suits triable by subordinate judges. It follows that there is also no distinction between appeals from munsifs which can be heard by subordinate judges and appeals from subordinate judges which must be exclusively heard by District judges. It sometimes happens unless care is taken in the distribution of appeals, that the original trial may have been held by a first class subordinate judge and the appeal heard by another first class subordinate judge of the same or even lower standing in the service. In this manner the value of first appeals may be impaired.

The large powers conferred on judicial officers of the lowest grade have the result that justice is brought nearer the homes of parties even for the trial of large claims. There is no great centralisation at the headquarters station of a large number of courts as is noticeable in other parts of India. There is therefore no scope for the appointment of registrars except perhaps in four or five districts in the Presidency, namely, Ahmedabad, Poona, Belgaum, Thana, and Khandesh. Even as regards these, we understand that it is proposed to partition Ahmedabad, Thana and Khandesh, so that even here the need for a registrar may not be felt.

4. The powers of the courts of assistant and joint judges which are another peculiar feature of the Bombay Civil Courts Act have been discussed elsewhere. We have also mentioned that the limit of small cause court powers of first class subordinate judges invested with small cause court powers under section 28 of the Bombay Civil Courts Act has been recently raised to Rs. 1,000 which is higher than the limit in any other province in India. So has the jurisdiction of small cause court judges under the Provincial Small Causes Courts Act. The result of this enhancement of jurisdiction was that 9,550 more small cause suits were disposed of by subordinate judges in the year 1922 under the enhanced jurisdiction and no complaint was made before us of any abuse of this enhanced jurisdiction.

5. There is one provision of the Bombay Civil Courts Act which in our opinion is open to criticism. It is section 32 which provides that no subordinate judge or court shall receive or register a suit in which the Government or any officer of Government in his official capacity is a party, but in every case such judge or court shall refer the plaintiff to the district judge in whose court alone such suits shall be instituted. The result of this provision is that in several district courts in the Presidency there is a congestion of suits against the Secretary of State or against officers of Government in their official capacity, which the district judge has not time to take up. The great majority of these suits are of a very simple character and the subject matter is of trifling value.

An attempt was made in 1914 to get over this inconvenience by relaxing the rule in certain classes of cases. By Bombay Act V of 1914 it was provided that suits against an officer of Government constituting the Court of Wards or who has been appointed a manager of the property of a Government ward, could be brought in the court of a subordinate judge. But suits to which the Secretary of State for India in Council is a party or in which a Government officer like the talukdari settlement officer of the manager of the Sindh encumbered estates is sued in his official capacity, are still brought in the court of the district judge. In no other provinces in India is the jurisdiction of the courts of subordinate judges or munsifs restricted in this manner. We could discover no reason why it should continue to be so restricted. There is no reason to suppose that subordinate judges in Bombay will be in any way inferior to their brethern in the other provinces of India in doing justice between the Government and the subjects. Nevertheless, both official as well as non-official opinion in the province was opposed to section 32 being entirely repealed. And if in deference to this opinion, the court of the district judge is still to continue to be the forum where suits of this description should be instituted, we think that discretion should be given to the district judge to transfer such suits as he thinks fit for trial to subordinate judges, so as to avoid congestion in his own court.

6. The only other class of civil courts calling for notice are courts of village munsifs created by the Deccan Agriculturists' Relief Act, Act XVII of 1879. Village munsifs are either village headmen or persons possessing local influence in a village who are invested with powers to take cognizance of suits for recovery of money or movables, the subject matter of which does not exceed Rs. 10 in amount or value and the defendants at the time of the commencement of the suit reside within the local area of such village munsif's jurisdiction. A strong committee was appointed in 1910 to report on the working of the Deccan Agriculturists' Relief Act in the Bombay Presidency and it expressed the view that so long as the pecuniary limit of the jurisdiction of the village munsifs was restricted to Rs. 10, not much harm would be done by their retention, but that they did not think that the experience gained of the work done by conciliators gave that confidence in an unpaid agency which would justify the enhancement of the powers of village munsifs beyond Rs. 10. They added that as village munsifs deal with all classes of suits and not only with those in which agriculturists are parties and as they are useful to take such petty suits off the shoulders of subordinate judges in industrial centres, their appointment is rather for the relief of the subordinate judges than for the relief of the agriculturists and that if the appointments are to be retained, the provisions relating to them should form part of the ordinary law and not of the law for the relief of the Deccan agriculturists.

7. The provisions of the Deccan Agriculturists' Relief Act regarding conciliation were in the opinion of that committee unpopular and ineffective and have since been abandoned. It was in a very

small percentage of cases that the conciliators succeeded in effecting an agreement. The above committee found that during the 5 years preceding their report out of a total number of 544,267 applications only 64,435 agreements had been made. In other words conciliation had been effected in 11 per cent. of the cases. In the remaining 89 per cent. the parties had been put to useless expense, inconvenience and waste of time in having to go before the conciliators. The committee observed " One strong point against conciliation must not be forgotten. There are genuine disputes which go before a conciliator which may or may not be settled; there are also a large number of applications in which the applicant knows that a complaint in a court of law would not stand for a moment. In these cases, if conciliation fails, he goes no further. If it is successful, he gets from the defendant what he is not entitled to and would not get in a court of law. Mr. Boyd, Judge of Poona, gives the following estimate of the percentage of such cases. " Taking 100 cases before a conciliator, there may be 10 agreements and certificates may be issued in 40 cases. In the remaining 50 nothing further happens, which shows that in these cases either the plaintiff has so poor a case that he does not think it worth while to go on or that his bringing the application before the conciliator has enabled him to put the screw on and get something out of the debtor. Most of these cases would not be taken into court at all."

It is probably the experience gained in the work of the conciliation system that makes the Government of Bombay, alone among the Provincial Governments, refuse to make a move in the direction of creating village panchayat courts.

8. The trend of recent legislation in the presidency has been to repeal the greater portion of the Deccan Agriculturists' Relief Act which was peculiar to the four Deccan districts and to extend a few of its more beneficial provisions as part of the general law applicable to the whole presidency including Sind. Exception was taken before us to two provisions of the Act which it was said lead to unnecessary delay. One is section 7 of the Act which renders it compulsory that the defendant should be examined in every case unless the subordinate judge for reasons to be recorded dispenses with such examination. Subordinate judges have complained before us that in a very large number of cases defendants do not appear, because, they do not wish to contest the claim. Nevertheless, the subordinate judges think it their duty to exhaust all the resources furnished by defendants summons, witness summons, proclamation, attachment of property and warrant of arrest, so as to bring the defendants before the court to record their examination. Whatever may have been the case when the Act was enacted, we were told that the agriculturist of to-day is not so helpless as to require all these efforts on the part of the courts to help him against his will.

Another provision to which objection was taken was the provision of section 11, which requires that every suit against an agriculturist defendant should be instituted and tried in a court within the local

limits of whose jurisdiction the defendant resides and not elsewhere. Several witnesses of position in Bombay and Karachi complained that defendants who were technically agriculturists carried on extensive business dealings as commision agents, etc., with merchants in Bombay and Karachi; and that when actions were brought upon these dealings they fall back upon their status as agriculturists and insist on being sued in the remote part of the mofussil which they allege to be their ordinary place of residence. It was stated before us that very serious hardship was caused in this manner to merchants in Bombay and Karachi and it was urged that the law should be amended so as to restrict this provision to agricultural debts and not to claims arising from mercantile transactions.

9. Turning now to the delays in the mofussil courts in the presidency, it has been shown in previous chapters that the position as to delays in Bombay is quite as serious, as in the two other major provinces of Bengal and Madras. The total number of decisions during the year 1922 was 59,574; of contested decisions 25,065; the number of suits pending more than 3 months was 25,065 and the number pending more than a year 5,682. These figures require no comment. Applying the criterion laid down in an earlier Chapter, it will be found that the position in a certain number of courts is serious and in some courts it is unmanageable. The records of the cases we examined showed that in the more seriously contested class of work, there is considerable room for improvement in methods. Adjournments were frequent. Trials were rarely held *de die in diem*. It takes from two to two years and a half to reach a decision in a contested title suit in a subordinate judge's court. We were told that among other factors which make for delay is the system of " linked " courts prevailing in the province, which necessitates long adjournments. The need for territorial redistribution of jurisdiction in certain courts in view of recent developments in communications was also brought to our notice. We have examined the figures of disposals and of arrears in the several subordinate courts in the province and we were struck with the disparity of the work turned out. We are aware that the nature of the work differs in different parts of the province. We think it would be very useful if a standard of work be fixed for the several courts on the basis of the work turned out, say during the last 10 years as was done by the Greeven Committee in the United Provinces. In utilising judge power to the full extent two conflicting principles have to be borne in mind; the principle of the proximity of the court to the litigant to which great importance is given in this province and the principle of the equalisation of work of all the courts which has a wider application in other provinces. But if a standard such as we have mentioned is fixed, we consider that it would not be difficult to effect a compromise between the two conflicting principles, so as to minimise delays by ensuring a fairer distribution of work.

We cannot pass unnoticed one point in the evidence given before us in this province that a considerable proportion of the judges in the mofussil do not sit in court for the full time prescribed in the

High Court circulars. We are recommending in Chapter 34 that all judges in the districts throughout India should fill in a time sheet showing at what hour they took their seat on the Bench for the disposal of cases in public and it is for the High Court to decide whether in view of this evidence all judges in the mofussil should not be asked also to enter the hour when they rise from the Bench as is the practice in other provinces in India.

10. As regards superintendence, the rules prescribe that district judges should inspect courts subordinate to them at least once in every two years. But this standard is hardly ever attained. District judges in busy courts do not find time to go out on inspection with the result that important courts remain uninspected for four or five years. Inspections by High Court Judges have also been less frequent in recent years. The rules also require that a return should be submitted every six months containing an abstract of the order sheets with an explanation in all original suits pending over a year and the execution cases pending over 6 months. This return is submitted in the first instance to the district judge who makes such observations as he thinks fit and submits the originals to the High Court where they are dealt with by the Administrative Judge. In this manner delays are controlled to some extent. We were told that in some instances the inspections of district judges were not effective and that far too much of the inspection was done by the clerical establishment. We have already noted that while the inspection of the office registers, etc., by the office establishment was unexceptionable, the inspection of the judicial work should always be done by the judge himself. The fact that order sheets are written up in the vernacular is a very serious draw-back especially in a province where there are four distinct vernaculars and we would suggest for the consideration of the High Court whether in a province where the standard of English literacy is very high, it should not be rendered compulsory to write out the order sheets in English.

11. A peculiar feature of the judicial administration in this province is the fact that the district judge has to administer a large number of estates of minors who are wards of the Court. These are all estates which the Court of Wards does not administer either because they are too small or they do not pay land revenue to Government. The routine management is done by the deputy nazir, but on all important matters he has to submit detailed reports to the district judge, who, after making such further enquiry as he thinks fit, passes orders in each case. For instance, in the judicial district of Ahmedabad in the year 1923 there were 206 minors' estates of the approximate total value of Rs. 3,252,081 under the management of two deputy nazirs. The district judge in consultation with the deputy nazir has to fix the proper maintenance amounts for the minors and their dependents, sanction additional expenditure to meet contingencies like serious illness of the minors or their dependents, fix suitable amounts for carrying out necessary repairs to their properties and so on. On occasions the district judge has to decide whether a proposed bride is suitable for the minor and

to determine what amount should be sanctioned for celebrating the marriage, or for the purpose of other ceremonies. Sometimes he has to decide whether it would be desirable to avoid litigation with which a particular estate is threatened by a settlement out of court or whether it would be more prudent to meet it in a court of justice. He has similarly to make up his mind whether or not, it would be in the interests of the minor to institute a civil suit for recovery of property, for realisations of outstandings, etc. Occasionally the district judge has to enquire and satisfy himself whether the personal guardian of the minor attends properly to his health, education, etc. In no other province in India is the district judge burdened with duties of this character. We consider that this is probably because courts in this province make insufficient efforts to find a suitable private guardian. Where the estates cannot be handed over to the Court of Wards, we are of opinion that an agency other than a judicial agency should be substituted for its administration. In any case there is no need to employ such a costly agency as that of the district judge.

12. The miscellaneous work done by district judges is in some districts exceptionally heavy and complicated. The most important work under this head consists of references under the Land Acquisition Act and cases under the Company Law. The latter class of cases is virtually confined to the district court of Ahmedabad, which apart from the large amount of commercial litigation with which it has to deal, has to dispose of many matters under the Company Law. It is a district court *sui generis* and in our opinion requires a judge specially trained in commercial law. As regards references under the Land Acquisition Act, there is a great deal of work in courts like Ahmedabad, Thana and Poona, where acquisitions on an extensive scale are being made for development projects or engineering enterprises. Difficulty is felt in view of the technical character of the work in finding suitable judges to dispose of these references. A suggestion has been made that certain judges should specialise in this class of work and should be available for posting where necessary.

13. Turning to first appeals, we find that Bombay is the only province where Order 41, rule 11 of the Code is applied to first appeals filed in district courts. In the year 1922 out of a total of 4,287 appeals decided, 765 were summarily dismissed under Order 41, rule 11. We find that in no other province is use made of Order 41, rule 11, to any appreciable extent in admitting first appeals in district courts. In appeals against orders in execution and even in regular appeals of certain kinds which on the face of them are frivolous and brought for purposes of delay, district courts of this province make systematic use of Order XLI, rule 11, so as to safeguard the interests of respondents and do not admit every appeal that is filed as a matter of course. The system is that under the general orders of the district judge, the sheristadar sorts the appeals filed in the court into two classes and places them before the judge for orders whether notice should issue to the respondent forthwith or the appeal should be fixed for preliminary hearing

under Order XLI, rule 11. The latter class consists mainly of appeals against orders in execution proceedings or appeals against decrees which on perusal of the judgment of the lower court appear to be those in which the respondent is not likely to be called upon to support them. Notice issues to the respondent in the former class of cases as a matter of course and in the latter the record is sent for and the appeal fixed for hearing under Order XLI, rule 11 within one month from the date of institution. On the day so fixed, after hearing the appellant's pleader, the judge either orders notice to issue to the respondent or summarily dismisses the appeal, recording in the latter case a short judgment giving his reasons. The average duration of appeals before district courts in 1922 was 117·2 days. During the year 1922, 4,287 appeals were disposed of leaving 5,005 appeals pending at the end of the year, of which 1,704 were pending for over a year. It follows that new-comers had no chance of being heard for about 18 months from the date of the institution.

14. As regards appeals to the High Court, the most noticeable feature is the progressive fall in the number of appeals from appellate decrees during the last 4 years. In the year 1919 there were 986 such appeals, 894 in 1920, 787 in 1921 and 727 in 1922. The disposals during these years were considerably in excess of the institutions and the arrears are inconsiderable. We may add that the proportion of second appeals dismissed under Order 41, rule 11 has also steadily risen during the last few years, the percentage of appeals dismissed to appeals instituted in 1922 being as high as 46·89, whereas in previous years it varied from 20 to 30 per cent. It may be that the stricter scrutiny exercised in the admission of second appeals has acted as a deterrent in filing frivolous second appeals.

CHAPTER 53.

Sind.

1. The province of Sind covers a total area of 46,506 square miles with a population of 3,279,377 inhabitants. It is divided into four judicial districts. The judicial staff at present consists of a Judicial Commissioner, four additional judicial commissioners, three district judges, one joint judge, one assistant judge, one small cause court judge, three first class subordinate judges and 13 second class subordinate judges.

The total number of suits instituted in the year 1922 was 27,545. The total number of cases decided was 27,577 regular suits, 17,418 miscellaneous cases, 338 regular appeals and 131 miscellaneous appeals.

2. The civil courts in the province are constituted by Bombay Act XII of 1866 as amended by Bombay Acts I of 1906, I of 1910 and II of 1916. The court of the Judicial Commissioner is the highest court of appeal in civil matters in the province. It is also the district court of Karachi. It consists at present of three permanent and two temporary judges, one of whom is the Judicial Commissioner and the others additional judicial commissioners. Within the district of Karachi each of them exercises all the jurisdiction and has all the powers of a judge of a district court.

The High Court of Bombay has no jurisdiction over the province of Sind, but this does not affect the Administrator General's Act (III of 1913) or invalidate the grant of Probate or Letters of Administration made by that High Court. Criminal jurisdiction over European British subjects residing in Sind has been taken away from the Bombay High Court and vested in the Judicial Commissioner's Court since 1st September 1923 by the amended Code of Criminal Procedure and a Full Bench of the Judicial Commissioner's Court has recently held that since that date it is the Judicial Commissioner's Court and not the Bombay High Court that has jurisdiction as regards decrees in matrimonial suits. This decision however was not unanimous and the question appears to be difficult. Having regard to the extreme undesirability of decrees in matrimonial suits being set aside as made without jurisdiction, this matter requires the immediate attention of the Legislature.

3. The history of the Karachi Court is interesting and is briefly as follows:—Before the conquest of Sind in 1843 no civil court existed in the province. After the conquest Sir Charles Napier, as Governor, established military courts. In 1849 these were abolished and civil and criminal courts substituted. In 1860 the Commissioner was still the head of the criminal and civil jurisdiction, but he had been provided with a judicial assistant. In 1866 this latter officer gave place to a single Judicial Commissioner presiding over a Sadr court with appellate and revisional powers over the district courts which by then had been created throughout the province. Eventually the powers of the Sadr court were in 1906 and 1909 transferred to the court of the Judicial Commissioner. By this

change the district judgeship of Karachi was abolished and a court formed of a Judicial Commissioner and two additional Judicial commissioners, one of whom had to be a barrister. An appeal lies within the Court from the decision of one judge sitting at first instance to a bench of two judges. As litigation rapidly increased, especially during the boom which followed the Armistice, a temporary appointment of a fourth judge and recently of a fifth judge has been created.

We have in Chapter 15 dealt with the peculiar problem presented by the court of the Judicial Commissioner in its district court jurisdiction as the court of original jurisdiction over all suits arising within the city of Karachi and all "special jurisdiction suits" arising outside the city but within the Karachi district. In this Chapter we shall confine our remarks to the work done by the Judicial Commissioner's court in the exercise of its High Court jurisdiction and to the work of the district and subordinate judges in the three remaining judgeships of Hyderabad, Sukkar and Larkana.

4. We have already adverted to the very serious delays on the Original Side of the Judicial Commissioner's court in the exercise of its district court jurisdiction. The delays in the courts of district and subordinate judges in the mofussil are quite as serious. We have already accepted the criterion that where the figure of pending suits of over one year amounts to more than one half of the decisions of contested suits in the previous year, the arrears have become unmanageable. The following table shows the state of the file of the courts of the three first class subordinate judges in the province as it stood at the end of the year 1923:—

Statement showing civil work done during 1923 by the 1st class subordinate judges in Sind.

District.	SUITS.					MISCELLANEOUS CASES DISPOSED OF			
	Instituted.	Disposed of	Contested out of Col. 3.	Pending.	Number pending over one year.	Execution cases.	Judicial.	Non-judicial.	On appeal.
1	2	3	4	5	6	7	8	9	10
1. Hyderabad .	146	76	8	70	22	53	5	29	..
2. Sukkar .	294	144	33	150	79	99	5	4	..
3. Larkana .	65	33	4	32	0	21	8	..	..

These figures are startling. The contested disposals during the year in each court are exiguous. It was explained to us that only those suits were classified as contested in which judgments had to be written and that a considerable number of suits classed as uncontested represented a great deal of work on the part of the judges in bringing about a settlement. Even so, the figures of suits pending more than a year ranging, as they do, from 150 per cent. to 275 per cent. of the contested disposals of the previous year are proportionately the highest in India and require attention.

5. A curious feature in the figures of duration in this province is that the duration of uncontested suits is higher than that of contested suits. In the year 1922 the duration of contested suits was 505·3 days in the district courts including the court of the Judicial Commissioner of Sind (district court jurisdiction) as contrasted with the duration of 723·6 days in the case of uncontested suits. Similarly in the year 1921 the figures of duration for contested and uncontested suits was 408·7 and 948·5 days respectively. It was explained to us that apart from delays in the service of processes and execution of commissions outside the province a good portion of the duration of uncontested suits represented the time spent in efforts made by the courts in bringing about a compromise between the parties. We are not sure that this explanation is very convincing. We notice that in the courts of subordinate judges the duration of uncontested suits is considerably less than the duration of contested suits. It is difficult to understand why the reverse should hold good with regard to district courts and the Court of the Judicial Commissioner. It may be, as some witnesses stated, that in the more complicated classes of suits instituted in district and Judicial Commissioner's courts the parties were so exasperated by the numerous adjournments that they were virtually driven into a compromise.

Nor are the appeals in the districts disposed of with any greater expedition. The average time taken for the disposal of first appeals in the district courts is 483 days. Judging from the disposals in 1923 there were at the end of that year arrears which would take more than two years to dispose of in the district courts of Hyderabad and Larkana and about a year in the district court of Sukkar.

6. The figures of disposals of appeals are not any better in the Judicial Commissioner's court in its High Court jurisdiction. The following statement shows the state of the civil appellate work of the Judicial Commissioner's court as it stood at the end of the year 1923:—

SIND.

Statement showing the state of civil appellate work at the end of December 1923.

Description.	Balance on 31st Dec. 1923.	Pending on 1st January 1924, appeals instituted in								Remarks.
		1915	1917	1919	1920	1921	1922	1923	Total	
First Appeals .	76	2	1	2	8	8	16	39	76	
Second Appeals .	57	..	..	..	3	3	6	45	57	
Misc. Appeals .	42	..	..	..	3	4	8	27	42	
Revision Applications.	89	..	..	..	2	7	15	65	89	
Applications under Act X of 1865 (H.C.J.)	2	..	..	..	..	..	.	2	2	

The average duration of a first appeal in the Judicial Commissioner's court is 396·6 days and of a second appeal in 320·13 days. In no province of India do the law's delays assume a more acute form. We understand that an effort was recently made to dispose of the heavy accumulation of arrears of second appeals by a bench sitting continuously for a long period. We think that the arrangements for the fixing of benches should be made more elastic in this Court, at any rate till the appellate work is reduced to much smaller preparations.

7. As regards the district courts it was stated before us that district judges were so entirely absorbed in criminal work that they could not devote more than two or three days a month to civil work. If that is so, it seems to us that it is imperative that steps should be taken to give relief to district judges from incessant criminal work.

8. There are special problems in this Province connected with arbitration and insolvency administration. These have been dealt with elsewhere under their appropriate headings.

9. There are also problems such as those arising from the extension of the Deccan Agriculturists' Relief Act, the administration by district judges of estates of minors and the exclusive jurisdiction of district judges to try suits against the Secretary of State and certain officers of Government, which are common to this province and the Presidency of Bombay. These have been referred to in our Chapter on Bombay.

10. One characteristic feature of the local Bar may here be mentioned namely that pleaders work in partnership. It is very rare for a pleader to start practice on his own account. He generally succeeds in joining a firm of pleaders and is engaged at first on a fixed remuneration. This system has its advantages. A young pleader is initiated in his work by a senior partner and the defects in training in the local Bars which we notice in Chapter 7 are here not so conspicuous. There is here less excuse for adjourning a case on the ground of the pleader for either party being engaged in another court.

CHAPTER 54.

Agra.

1. Thirty-three districts in the province of Agra are under the control of the High Court in exercise of their civil jurisdiction. The hill tracts, while under the control of the High Court in exercise of their criminal jurisdiction, are not under the control of the High Court in the exercise of their civil jurisdiction.

These thirty-three districts have a population of about thirty-three million people. Their territory is divided into nineteen judgeships, most of which are small. One, however (Gorakhpur), is very large, with a population of over five million persons. The remaining larger judgeships are Cawnpore, Meerut, Allahabad, Benares and Moradabad. Owing to the comparative compactness of the judgeships, the work of supervision is not excessive or beyond the capacity of individual district judges. It is due to this fact very largely that there is not much to complain of in the disposal of the original civil work of courts.

2. District judges are expected to inspect courts subordinate to them every year. Although this standard is never attained, inspections by district judges are reasonably frequent both in this province and in Oudh. Inspections by Judges of the High Court have increased of late years, and practically every judgeship in the province has been inspected by a Judge of the High Court in the last three years. Supervision is further exercised effectively by a provision in the rules, under which an abstract of the order sheet with an explanation in original suits pending over six months, and execution cases pending over a year, is submitted quarterly to the district judge, who, after passing orders and noting on each explanation, submits the originals to the High Court in respect of suits and cases pending over a year. The Judge in the English Department passes orders on each explanation so submitted.

3. The civil courts (ranking upwards) are the courts of munsifs, subordinate judges and district judges. Munsifs have jurisdiction, almost invariably, up to Rs. 1,000 only. Subordinate judges have unlimited jurisdiction. There is a special grade of sessions and subordinate judges who exercise the full powers of a sessions judge on the criminal side and the powers of a subordinate judge on the civil side.

In 1922 there were on duty seven sessions and subordinate judges, forty subordinate judges (including small cause court judges) and eighty-one munsifs. There has since been a net increase to the cadre of two subordinate judges and seventeen munsifs.

It is doubtful whether expedition would be increased in this province by raising the jurisdiction of munsifs. The distribution of the work over the various areas gives, as a rule, exactly sufficient to each munsif, and the work could not be well increased.

The staff is sufficient. Although the judges have plenty to do, the original work has not got out of hand. The work in original suits has, however, in the past been liable to deteriorate owing to a desire to show expedition and the work in execution has frequently been anything but satisfactory. The recent increase to the staff should be sufficient to provide for all requirements of the subordinate courts unless there is an exceptional increase in institutions.

4. The work has increased considerably in the last fifty years. In 1870 there were 80,184 institutions of civil suits. The number of institutions gradually increased until it rose to 95,573 in 1900. Since then there has been a very considerable increase, and the number of institutions now varies about the figure of 150,000. Arrears have not accumulated unduly. On the 30th September 1923 there were only 709 original suits pending for over a year in the province.

The miscellaneous civil work of district judges is on the whole not heavy or complicated. Land acquisition references are not many. The work under the Guardian and Wards Act, Probate and Administration, and the Succession Certificate Act is comparatively light, and there are few suits relating to religious endowments. In some judgeships, however, there is an appreciable amount of work under these heads. In Benares the testamentary work, and in Cawnpore the insolvency work take up a considerable portion of the time of the district judges. Other instances could be cited. The duties of district registrars should not be performed by district judges.

The quantity of original work to be disposed of by the courts in Agra and Oudh would be as much as in Bengal were it not that suits relating to recovery of arrears of agricultural rent, enhancement of such rent, resumption of holdings held rent free or on favourable terms, ejectments, and other questions arising between the landholders and tenants of agricultural land, and suits between landholders for partition, division of profits and the like are excluded from the jurisdiction of the civil courts and heard by special Rent courts. Appeals in a certain limited class of these suits lie to the civil courts, but these appeals are not numerous. The number of suits in Agra and Oudh excluded in this manner, which would have been heard by the civil courts in Bengal and Bihar, amounts roughly to about half a million. The appeals are ordinarily decided by Revenue officials. The appeals which lie to the civil courts are not more than fifteen hundred.

5. There has been special legislation for the Bundelkhand Division of the province. This division consists of the districts of Jhansi, Banda, Jalaun and Hamirpur. The agricultural conditions are precarious, and the inhabitants are backward in this area. Special conditions rendered Revenue administration on the principles usual in the rest of the province unsuitable, and it was difficult to adapt a system to the people. In the result partly of a series of climatic misfortunes and a somewhat unintelligent system the condition of the landholding community became steadily worse. An attempt was made in 1882 to relieve the situation in certain tracts by the

enactment of the Jhansi Encumbered Estates Act (XVI of 1882) which created a special court to adjust the debts of certain encumbered proprietors. The advantages gained were largely counter-balanced in the immediate future by new extravagances. In 1903 a far-reaching scheme became operative. Under the Bundelkhand Encumbered Estates Act (Local Act I of 1903) courts were created for the adjustment of the debts of agricultural proprietors while the powers of transfer by such proprietors were considerably circumscribed by the enactment of the Bundelkhand Alienation Act (Local Act II of 1903). These acts operated in the four Bundelkhand districts and also in a portion of the Allahabad district. The result has been greatly to reduce subsequent litigation in these tracts.

6. In addition to the regular civil courts there are certain honorary courts in the province, namely courts of honorary munsifs and village munsifs. In 1922 there were thirty-one courts of honorary munsifs in existence. They decided 8,007 suits of which 1,272 were contested. There were 180 courts of village munsifs (only 110 of which did any work) which decided 8,669 suits. In 1923 the number of courts of honorary munsifs had increased to thirty-five, and the number of suits decided increased to 8,873. Only 1,226 were contested. The number of courts of village munsifs decreased to 162 only 98 of which did any work. They disposed of 8,083 suits.

When courts are established in any area under the United Provinces Village Panchayat Act (Local Act VI of 1920) the courts of village munsifs in that area will be abolished. No courts have so far been established under the provisions of that Act.

Honorary courts have not so far been very successful. There has been great difficulty in obtaining judges of the right type. Where men of position and public spirit have come forward, the courts of honorary munsifs have had some measure of success. But there have not been sufficient men of this class in the past, who have cared to accept such posts, and in the present even fewer can be obtained, as the pressure of public affairs largely reduces the field of appointment.

The courts of village munsifs have never been popular. Most of the people place little reliance in their capacity and prefer to take their disputes before a paid tribunal. Apart from want of confidence, there are complaints that decisions are unduly delayed in these courts. Mr. Justice Kanhaiya Lal, a Judge with over thirty years' experience wrote in his memorandum "Except here and there honorary munsifs and village courts have, as a rule, been dilatory and unmethodical in their habits and work, and I do not think that it would be expedient to extend their jurisdiction or powers or to replace the stipendiary courts in respect of any portion of the more important work now done by them by such honorary tribunals." He added in his oral statement:—

"It has been reported many times that they are very dilatory: they adjourn cases very frequently, and I am also told that there

are instances of honorary munsifs who sleep and enjoy rest during the whole of the day in the upper storey while their peshkars take down evidence. They usually come down at three or four o'clock in the evening and then pass orders. I am not saying this from my own experience, but these are only reports. They delay disposal considerably. But there are some good men also. I would keep the system as it is and try to improve it, but not extend it in any way. In fact I was told recently that there was a case in the small cause court for the recovery of money. The case was transferred from the small cause court to the court of an honorary munsif and it dragged on for about nine months, that is from April to January. Had the case been tried in the small cause court itself, it would have been disposed of in fifteen days."

Mr. Justice Mukherji stated "The village courts have proved a failure and the honorary munsifs are not much better."

There are, as has been noted already, hopes as to the prospects of the new panchayat courts, but it is premature to form an opinion upon them. The Local Government is interested in the experiment, and efforts will be made to ensure its success.

7. The nature of litigation varies. In the eastern districts it resembles litigation in Bihar and Bengal. In the western districts it resembles litigation in the Punjab. There is considerable affinity between the Bihari and the inhabitants of the eastern districts and between the Punjabi and the inhabitants of the western districts. Land tenures are, however, not so complicated in the eastern districts as they are in Bihar, and questions of custom are not pressed in the western districts to anything like the extent to which they are pressed in the Punjab. The mass of petty litigation in this province, as it is in most parts of India, is concerned with debt collecting. The more serious litigation centres round the land. The inhabitants of the province have the land hunger common to most inhabitants of India, and are as tenacious of their rights in the soil and as envious of the rights of others as is the case elsewhere. There are not many peculiar forms of litigation. The principal is in connection with the exercise of the right of pre-emption. Claims to exercise such a right are not, however, universal. It is only in some districts that they are frequent.

The law of pre-emption was formerly in a state of great uncertainty. Different Benches of the High Court had arrived at conflicting conclusions on salient points, and litigation under this head was tending to increase. Since the special pre-emption Bench of the High Court was constituted some fifteen years ago there has been an improvement.

8. Suits in respect of succession to large estates arise in this province, though they do not present the same difficulties as suits to succession of the Oudh talukas. One peculiar difficulty in the decision of these suits in both provinces is owing to the raising of

involved questions of custom with a consequent array of a mass of oral and documentary evidence. If titles in the large estates in the province of Agra and the talukas of Oudh were investigated and the rules of custom applicable were laid down by a competent authority, and legislation introduced to embody the conclusions, a mass of litigation would be removed to the benefit of the persons concerned. We recommend this suggestion to the Local Government.

9. There has not been so far much development in commercial litigation. Cawnpore is the only really large business centre, and there commercial litigation has not so far become unwieldy. The provisions of the Arbitration Act of 1899 were extended to Cawnpore in 1915 and disputes between firms in Cawnpore are now frequently referred to arbitration. The need of a special commercial court is not as great in Cawnpore as it is in Delhi. But the authorities should be prepared to supply such a court, for there is every reason to suppose that as years go on, commercial litigation in Cawnpore will increase both in volume and in complexity. There are other places also in which it may be necessary, possibly in the near future, to create commercial courts. There is a considerable grain business in the west particularly in centres like Ghaziabad and Hapur. Khurja and Hathras are also becoming business centres.

10. The tendency of late years has been to abolish outlying munsifis and to bring such courts as far as possible to headquarters, but owing to the restricted jurisdiction of the smaller judgeships there are not, as a rule, very many courts at headquaters. For this reason the registrar system could only be introduced in a few places in the province. There would be sufficient work for a registrar in Gorakhpur, Cawnpore and Meerut and possibly in other places, but for the greater part of the province, there would be hardly sufficient work to justify the appointment of such an officer.

11. The system of hearing and deciding appeals below the value of Rs. 1,000 finally both on points of fact and law by a bench of two selected subordinate judges with a power to state a case on points of law to the High Court and a right of an appeal to the High Court in case of difference of opinion is eminently suited to the province of Agra. Railway communication with headquarter stations is good and there would be very little expense or inconvenience to the public involved in bringing appeals before such benches.

12. As has been already said, there is not very much delay in deciding original suits, but there is considerable delay in deciding appeals in district courts. What is required mainly in this province is the speeding up of the appellate work.

Delays are most conspicuous in the High Court itself. We have recently received the civil statements of the province for the year of 1923. The portion relating to the decision of appeals in the High Court shows that there were at the end of that year 1,207

first appeals and 2,138 second appeals pending. The details are as follows:—

Civil appeals undecided at end of 1923.

Year of institution.	First appeals.	Second appeals.
1920	33	4
1921	230	18
1922	427	647
1923	517	1,469
TOTAL	1,207	2,138

These figures are serious. Since May 1920 there have been two additional judges appointed to the High Court and the total number of judges is now nine. The arrears under the heading of first appeals are sufficient to occupy the time of two Benches for three years, and, even if relief is afforded to the High Court by the creation of the district benches already described, there is very little hope of the present judges being able to dispose of the arrears and the current work within anything like a reasonable period.

This accumulation is due to many causes. The civil work of the High Court has undoubtedly increased of late years. The criminal work has, however, increased even more. There have been recently a large number of very heavy criminal cases the disposal of which has shortened the period which can be devoted to civil work.

CHAPTER 55.

Oudh.

1. Oudh consists of twelve districts containing a population of about twelve millions.

It is at present under the control of the Court of Judicial Commissioner which consists of three judges namely the Judicial Commissioner, and two additional Judicial Commissioners. There are six judgeships:—Lucknow (comprising the Lucknow, Barabanki and Unao districts), Fyzabad (comprising the Fyzabad and Sultanpur districts), Sitapur (comprising the Sitapur and Kheri districts), Gonda (comprising the Gonda and Bahraich districts), Rae Bareli (comprising the Rae Bareli and Partabgarh districts), and Hardoi. Formerly one district judge for each judgeship was sufficient to control the work. There were in 1922 in addition two additional district judges in Lucknow, one of whom was permanently stationed at Barabanki, and another at Unao and one additional district judge in Sitapur. There were three sessions and subordinate judges, twenty subordinate judges (including small cause court judges) and thirty-four munsifs. The jurisdiction of munsifs is as in the province of Agra. There is no reason to alter the jurisdiction. The staff has since been increased.

2. The figures for honorary courts are:—

	Number of courts.		Number of decisions.		Number of contested decisions.	
	1922.	1923.	1922.	1923.	1922.	1923.
Honorary Munsifs . .	36	36	4,878	6,410	...	...
Village Munsifs . . .	43	24	1,382	1,142	...	78

The honorary munsifs do better work than in Agra, as more leading men come forward. Panchayat courts have been opened in Oudh. It is too early to judge their value.

3. District judges as in Agra are expected to inspect courts subordinate to them once a year. They approach closely to this standard. Inspections by the Judicial Commissioner and Additional Judicial Commissioners might have been more frequent, but efficient supervision is kept up over the subordinate courts. Supervision is the easier, as they are few. The same system of submission of explanations of delay prevails as in Agra.

The staff is sufficient, and the original work is not badly in arrears. The work is better advanced than in Agra. The work has

increased in the last twenty years. In 1902 institutions were 47,257. They had increased in 1906 to 64,826. They were 73,055 in 1916. The number has since fallen and was 67,903 in 1922.

The work of the district judges is much as it is in Agra. There are special Revenue courts which deal with rent and revenue cases.

4. Suits are more complicated than they are in Agra. More suits centre round the land, and the land hunger is more intense. Decision requires peculiar care as the tenures are complicated, and much of the litigation has a long history behind it.

There are many disputes between talukdars, and under-proprietors or tenants, and these disputes require great care in decision. A feature in Oudh is the Court of Wards litigation. Very many of the larger estates are under Court of Wards management, and the number of suits to which the Court is a party is appreciable. Formerly the manner in which the Court of Wards prepared their cases was open to criticism, but there has been a considerable improvement of recent years. The ideal would be to have a separate legal department to advise on and prepare the Court of Wards cases.

Special provisions have been made under the provisions of the Oudh Laws Act (XVIII of 1876) in respect of dower amongst Muhammadans, and pre-emption. In Oudh it is open to the courts to go behind the contract or agreement to fix the dower payable by a Muhammadan husband, and to award only such amount as is reasonable with reference to the means of the husband and the status of the wife. Under the Act the right of pre-emption is usually presumed in village communities. A statutory safeguard is provided against the institution of speculative suits by a condition that a person wishing to exercise the right must tender the price within three months of receipt of notice of sale.

5. A peculiarity of Oudh procedure is that the record of evidence in civil courts consists of a note made by the presiding officer of the essential points of the evidence of each witness. The presiding officer is not expected to record everything that the witness says. The apprehension that failure to record everything that a witness says will lead to a miscarriage of justice has not been realized in Oudh. The experience of appellate courts in that province is that the record of evidence is as full and sufficient as is necessary. The tendency of the judges in subordinate courts when left to themselves is rather to record more than is required. This tendency is most marked in talukdari cases.

6. The most distinctive feature in Oudh litigation is the litigation in respect of succession to talukdari estates. This litigation has been described already in the chapter on Champerty. Although there are not a very large number of talukdari suits, they are the factor which exercises most influence upon the disposal of the work especially on the appellate side. Oudh is at present under a Judicial Commissioner's Court consisting of a Judicial Commissioner

and two Additional Judicial Commissioners. When there is a lull in talukdari litigation, the work of the court is not excessive and can be easily handled. There has been such a lull recently, and the work in this court is very well up to date. As has been already stated the original work in Oudh is more up to date than it is in Agra and the work in Agra gives little to complain of. Whenever there is an increase in talukdari litigation, the effect upon the appellate work of the Judicial Commissioner's court is considerable. A heavy talukdari appeal is argued, as a rule, for not less than one month. There have been appeals such as the Nanpura appeal in which the arguments lasted over four months. In such circumstances the court is tried severely, for two of the judges out of three are spending the whole of their time upon the hearing of arguments in one appeal.

Not much need, however, be said on this point, for the Judicial Commissioner's Court will soon cease to exist being superseded by a Chief Court. The Chief Court will probably have original jurisdiction in important cases and talukdari cases can, in that event, be heard by a Judge of the Chief Court. This will in every way be an advantage.

7. The case for investigating titles in large estates by competent authority, laying down the rules of custom applicable to them, and introducing legislation to embody the conclusions is stronger in Oudh than anywhere else in India. It is permissible to doubt the advantage of endeavouring again to amend the provisions of Act I of 1869. The result of the last amendment has not been happy, and the failure was attributable not to want of capacity on the part of the draftsmen, but to the inherent difficulty of the subject.

8. There is practically no commercial litigation in Oudh. Lucknow is not a commercial centre, and the other towns are negligible. The registrar system could be introduced in Lucknow, but hardly anywhere else. The district appellate bench system could be introduced with great advantage. Two benches would be sufficient—one at Lucknow and one at Fyzabad.

The appellate work of the Judicial Commissioner's Court is at present well in hand, and should be kept up to date, when the Court becomes a Chief Court.

CHAPTER 56.

The Punjab and Delhi.

1. The Punjab excluding Delhi, which is now a Chief Commissionership and the North-West Frontier Province, contains twenty-nine districts. The district of Delhi is also under the control of the High Court. The population is about twenty-two millions. This territory is divided into twenty-one judgeships.

2. The system has undergone great changes in recent years. Formerly, there was no special cadre of judges exercising original civil jurisdiction in suits of smaller value. Such suits were decided by assistant commissioners and extra assistant commissioners. These officers were entrusted also with executive and criminal powers. It is unnecessary to trace the history of the system through the divisional judge, the district judge (old style), the subordinate judge and munsif. The present system gives unlimited original powers to a first class subordinate judge, powers up to Rs. 5,000 to a second class subordinate judge, powers up to Rs. 2,000 to a third class subordinate judge and powers up to Rs. 1,000 to a fourth class subordinate judge. There are no longer any munsifs. The usual practice is for all suits at headquarters to be filed in the court of the senior subordinate judge who retains a certain number, and distributes the remainder.

Under the old system officers who tried civil suits were not recruited from the members of the legal profession and were not possessed necessarily of even a rudimentary knowledge of civil law when they entered on their duties. They were expected to pick up their knowledge of law as they went on. Even when some specialization was insisted on, selection was apt to ignore as a requisite an acquaintance with judicial duties and appointments were frequently made of members of the ministerial staff. All this has been changed now, and at present only law graduates, for preference practising lawyers, are appointed subordinate judges. Many of the former class are, however, still in the service, and we have heard many complaints that the efficiency of this class of officers leaves much to be desired. There are not only complaints as to their efficiency; we have had complaints even as to the probity of some—fortunately a small minority. While we consider that we are justified in discounting the mass of these complaints as based on insufficient knowledge, we cannot overlook some. An Indian district judge of standing, himself a member of the provincial service, promoted for merit made the following remarkable statement:—

"Another thing I wish to say is this. In this province suits of a very large value are tried by subordinate judges who are very often incompetent and sometimes corrupt.

Q. Why do you say that? Is that simply an impression or was there any action taken because of corruption? Had the High Court occasion to dismiss any one on that ground?

A. Yes. There have been dismissals and prosecutions."

The High Court are, however, fully alive to the necessity of careful supervision on this point, and we see no reason to take a gloomy view of the situation. In a comparatively short time those who are incompetent or worse will by weeding out and retirement leave the service. The new men appear quite satisfactory.

We are, however, compelled to keep the fact that there is a leaven of inefficiency carefully in mind, in making our recommendations for alterations in the procedure and elsewhere.

3. Supervision is reasonably good. The High Court attaches great importance to inspections by one of their own Judges, and in the past have been provided with facilities for making such inspections by a temporary addition to their strength. District judges are required to inspect annually all civil courts which are not inspected by a Judge of the High Court. They frequently, however, fail to carry out these inspections. Supervision would be greatly improved if a better form of order sheet were introduced. There is attached to each record a list of orders (called in the vernacular a "fard-i-hukm") but this is merely an index. The orders are usually written up correctly but they are spread over the record. Further, there is need for the provision of quarterly reports giving statements and explanations of delay for all suits and execution cases pending over a year. At present some sort of explanation is submitted monthly of the six oldest cases in each court. That is not sufficient. These reports and explanations should be submitted through the district judge to the High Court.

4. Revenue work in the Punjab as in the United Provinces is disposed of by special Revenue courts. About 150,000 such revenue suits were instituted in 1922.

5. The system of honcrary courts has not so far been very successful in this province. The complaints against them are identically the complaints made against similar courts in the United Provinces. A Panchayat Act having recently been passed, the former honorary courts will be replaced by the panchayats. The Government of the Punjab is interested in the creation of these courts and assisting them to function usefully.

A very interesting experiment in the form of arbitration societies has already been described. The main advantage possessed by these societies is that every member desires to accept the decision of the tribunal and is pledged to accept it, when he joins the society.

6. The people of the Punjab are greatly addicted to litigation and the litigation is of more serious nature than in most other provinces. When the nature of the litigation in the Punjab is compared with the litigation in the adjoining province of Agra, it will be seen that although the population of the Punjab is only two-thirds of the population of Agra province, the institution of civil suits is greater in the former province than in the latter. Further,

the figures of valuation of 1922 show that the proportion of suits of higher value is greater in the Punjab and Delhi than in Agra.

	Agra.	Punjab and Delhi.
Suits under Rs. 500	135,805	169,973
Suits from Rs. 501 to Rs. 1,000 . .	8,670	15,039
Suits above Rs. 1,000	8,640	10,523
	153,115	195,535

There has been, however, no progressive increase in litigation in the last ten years; in fact, there has been a diminution. The institutions were highest in 1917, when they rose to well over two hundred thousand. They were fewer in 1922 than they had been in 1914. We have just received the figure for 1923 which shows that institutions dropped by over thirty thousand in that year. We are not in a position to state whether there is likely to be a permanent diminution in litigation in this province.

The main feature of the litigation in the Punjab is the preponderance of disputes which are decided according to customary and tribal law. From the date of annexation of the province, it was accepted as a principle that in all questions of family and tribal connection, proprietary right and village organisation, alluvion and diluvion, adoption and transfer of property, the courts should ascertain the custom of the community or the tribe and apply it in so far as it was equitable. Thus questions of marriage, succession, adoption, transfer of property and the like are to a very considerable extent decided according to custom. The court has to ascertain the custom. It is the exception rather than the rule for the Hindu and Mohammadan Law to be applied in their entirety. The law is usually applied as modified by local custom. The result has been undoubtedly to encourage litigation. These customs have to a large extent been defined in respect of various communities and tribes by judicial decisions.

The complications which have resulted have gone far to accentuate the extent and the difficulties of litigation in the province. The Punjab authorities have had under consideration for many years the question of the desirability of codifying this customary law. We are not in a position to express an opinion upon the subject. We have only to note that the express intention of the authorities to ascertain customs and decide disputes accordingly has created a peculiar and special feature in the litigation of this province.

7. Commercial litigation is particularly rife in Delhi and to a considerable extent in Amritsar. We have, however, dealt with this portion of the subject in the chapter on commercial litigation outside the Presidency-Towns. It has to be noted that other towns in the Punjab are likely to become important in respect of commercial litigation. The increase of manufactures, business, and trade is not confined to Delhi and Amritsar alone, but is beginning

to be noticeable throughout the province. Everywhere there are small factories being constructed, and wholesale and retail trade have received an impetus on all sides, and in spite of the set-back caused by recent depression, are likely to increase to a considerable extent in the near future. One of the particular needs of the province is to foresee the difficulties that will arise from this development and provide for them before they have come into being.

8. It will be difficult to introduce the registrar system in most parts of the Punjab, but it should be possible to introduce it in certain places. Lahore, Delhi and Amritsar appear to be indicated as places where the system could be introduced.

9. The system of district appellate benches can hardly in our opinion be introduced with advantage. We have already indicated that there is not as great confidence as we should like to see in the subordinate judges. We consider that the complaints made against them are certainly exaggerated, and would not consider that there would be any real difficulty in discovering subordinate judges competent to form members of such benches, but considering all circumstances we are of opinion that the introduction of the system should be kept in view but not introduced at present.

10. We wish also to impress the necessity of a careful examination of the work of the subordinate judges before they are given authority to record only a long note of the oral evidence.

11. The original work of the Punjab is by no means bad. The public do not have to wait for an undue time for the disposal of their cases and the figure of arrears has been steadily going down. In 1920 it was 248,113. In 1921 it fell to 190,302 and in 1922 it fell to 57,811. The recent figure of 1923 shows a further fall to 48,735. The main fault of the subordinate courts is the failure to hear their suits from day to day, but there has been a very considerable improvement in this respect owing to recent orders of the High Court.

12. As in the province of Agra, the delays are most noticeable in the decision of appeals. The work in the district courts under this head can be improved considerably, but the greatest delays here are to be found in the High Court itself.

There were pending at the beginning of 1924:—

877	First civil appeals.
1,276	Second civil appeals.
89	Letters Patent appeals.

The figures of 1923 show a considerable improvement, but on the standard of previous years the arrears in first appeals will take more than two years to dispose of. The situation is rendered the more difficult as there is no opportunity at present of reducing the work of the High Court by the creation of district benches in the province.

The accumulation is due to a variety of reasons. One of the main reasons is increase in criminal work.

13. We are very much struck by the very marked improvement that has taken place in the work of this province in the last few years. The supervision exercised by the High Court has been increasing in efficiency and has now attained a very high standard. For this reason we are disposed to be hopeful as to the result in future. The Punjab is a province in which we can leave with confidence improvement in methods to the present officers.

CHAPTER 57.

The North-West Frontier Province.

The North-West Frontier Province is in a different position to any other province in India. It consists of five districts with a population of about two and a quarter millions. There is one Judicial Commissioner, a divisional and sessions judge at Peshawar, who is assisted by an additional divisional and sessions judge, and a divisional and sessions judge at Derajat. There are district judges (old style—these would correspond approximately to senior subordinate judges in other provinces) in Peshawar, Bannu, Hazara, Kohat, and Dera Ismail Khan. There are also munsifs in these places. The population is small, but the litigation is heavy in proportion. In 1922 the institutions were 27,300. There is nothing to be said about this province in respect of delay, for there is no delay. The cases here are decided more speedily than anywhere else in India and it is rare for a decision to take more than three months. Most of the disputes are decided on communal and tribal customs. The Committee did not visit this province. It is difficult to see how disposals can be expedited to an appreciable extent, and we do not suggest any alterations in the present system or procedure.

CHAPTER 58.

Burma.

1. This province is in a period of transition. It consists of a large area sparsely populated except in a very few towns. The total population is just over thirteen millions. The province is divided into two clearly defined tracts, Lower Burma and Upper Burma.

Formerly the administration of civil justice in Lower Burma was with the Recorder of Rangoon, whose court was converted into a Chief Court. Upper Burma was under the Judicial Commissioner of Upper Burma. At the end of 1922 the present High Court was created. It has been exercising jurisdiction for about two years, and it is too early to judge its working. In the whole of Burma including Upper Burma there were twenty-two district and sessions judges, thirty-one assistant judges and seventy-five sub-divisional and township. The name for officers presiding over a court of lowest jurisdiction is "Township Judge." There were sixteen district judges in Lower Burma and six in Upper Burma.

2. In 1922, 69,325 suits were instituted in the province, as against 67,903 suits instituted in Oudh. The suits in Burma include suits between agricultural land-holders and tenants. There are no special Rent Laws in Burma. There were thirty-one assistant judges, and seventy-five sub-divisional and township judges in Burma. In Oudh there were three sessions and subordinate judges, twenty subordinate judges and thirty-four munsifs. It is true that in Burma sub-divisional judges and township judges have duties other than those of civil judges. In Lower Burma they are usually magistrates, who rise eventually to be magistrates of the first class, and in Upper Burma they have executive as well as magisterial duties. The cases in Burma are not as complicated as they are in Oudh. The majority of them are very simple. The staff in the subordinate courts is in our opinion sufficient.

3. It is only recently that it has become the practice to recruit qualified lawyers as judicial officers. Formerly, the practice was, as it used to be in the Punjab, to select for these appointments candidates without any knowledge of the law, and to leave them to pick up the information for themselves.

Owing to the simplicity of the average dispute in Burma, judicial officers were not in the past very seriously inconvenienced by the absence of training. Burma is, however, developing rapidly, and conditions of life are becoming more complicated. The effect upon litigation has not so far been great, but conditions in the law courts will become also more complex from year to year. Complaints were made to us as to the unsatisfactory work performed by some of the presiding officers of subordinate courts, but these complaints were not so much as to their incapacity to appreciate the points before them. The witnesses were apparently of opinion that so far they were competent to do the work they had to do.

The complaints were rather against the probity of these officers. We are of opinion that these complaints are not without foundation.

Such officers will in the course of time become eliminated. There is no reason to suppose that the officers now selected are either incompetent or untrustworthy.

4. The superior courts in some places require assistance. Both in the district judges' courts and in the High Court there are complaints that the work has become unwieldy. We are satisfied that in many courts this is the case, and that the High Court in particular required assistance in May 1924, the month in which we visited Burma. We are given to understand that assistance has since been given to the High Court. The situation has arisen mainly owing to increase of criminal work. Few officers have so far been supplied with stenographers. There is a very strong case for supplying them to district judges.

5. So far the honorary courts in Burma have done very little work. Proposals are under consideration for their reconstitution.

6. The conditions of Burma in respect of personal law differ greatly from those in India, and proposals are not required for increase of expedition in the trial of suits under the personal law. The personal law is almost entirely the Buddhist law. There is practically no litigation under the Hindu law, and very little under the Mohammadan law. Proposals have been made for the codification of the Buddhist law. Opinions are divided as to its necessity. There is a preponderance of opinion in favour of registration of the factum of adoption under the Buddhist Law. There would seem to be strong reasons why this should be done.

7. There is no great delay in deciding suits in Burma; there is considerable want of method in the disposal and there are many unnecessary adjournments, but the disposal of the work is speedy. The North-West Frontier Province is the only place in which suits are disposed of more quickly.

From amongst the records examined a few instances may be taken to show the celerity of the despatch. In a suit for specific performance of a contract of sale of a garden, the plaint was filed at the end of January 1922 and the suit was decided on the 30th June 1922. In a claim for property purchased in the name of the plaintiff's father on the ground that the plaintiff advanced the purchase money for the sale and was the real purchaser, the suit was instituted in February 1922 and decided on the 1st September 1922. In a suit to enforce a right of way and to remove obstructions, the case was actually decided after contest within two months of institution. These few instances show the celerity with which the work is done.

And in the matter of appeals there is also considerable expedition. Appeals are decided in the lower courts usually within six to eight months of institution and second appeals are decided by the High Court very promptly indeed. We have already adverted to the peculiarity of the system which permits a second appeal to be filed when the lower appellate court reverses or varies the decree

of the trial court. This system works well in Burma, and we do not suggest its alteration at present.

We received complaints as to the delay in deciding two particular suits and the records were sent for. The first suit was instituted on the 7th March 1914 and was not decided till the 12th October 1917. There was certainly avoidable delay in the hearing of this suit. The hearing of evidence did not continue from day to day and many witnesses were called who were examined on irrelevant matters. But in comparison with suits in other parts of India it cannot be said that the work was unsatisfactory. The connected suit, which was filed on the 22nd August 1918, was not heard badly. A preliminary issue was decided on the 4th November 1918, against which an appeal was filed to the Chief Court. The decision of that appeal involved difficult points of Buddhist law and in the result its decision had to be referred to a Full Bench against whose decision an appeal was filed to the Privy Council.

8. The registrar system cannot be applied with any advantage and district benches cannot be constituted. The work in which improvement can be effected is the work in Rangoon itself. That has been dealt with in another part of the report.

9. Commercial litigation does not require special treatment except in Rangoon itself. It is necessary to watch conditions in order to be ready to train judges, should commercial courts be needed in the future.

10. Beyond tightening up the procedure, improving the personnel in the subordinate courts and improving supervision and inspection as far as possible there is little to be done in Burma at present. The combination of civil and criminal powers in the sub-divisional and township judge seems unavoidable. There is not enough work of either kind for such officers. The difficulty in Burma is that distances are great, communications are bad, and there is an absence of large towns. Most of the so-called towns are large villages. It is not possible to provide in most of these places for an officer with civil powers only. There would not be sufficient for him to do. As it is, it is frequently necessary to put more than one place in his charge, and to arrange for him to visit each on circuit. The defects of the system are unavoidable and arise out of the conditions of the province. They are largely cured by the simplicity of the work. The cases are so easy that they are generally disposed of in a very short time. The work is such that it can be easily handled and controlled by the High Court, and it can be left with confidence in their hands.

CHAPTER 59.

The Central Provinces and Berars.

1. The Central Provinces and Berars cover a total area of 99,876 square miles with a population of 15,979,616 inhabitants. The province is divided into 11 judicial districts and in the year 1922 had a total judicial staff of 11 district judges, 45 subordinate judges, 6 judges of small causes courts and 71 munsifs.

2. The courts of civil justice in this province are now governed as to their constitution and jurisdiction by the Central Provinces Courts Act I of 1917 as amended by Act VIII of 1923. The highest court of civil appeal is the court of the Judicial Commissioner which consists of four or more judges one of whom is the Judicial Commissioner and the others additional judicial commissioners. One at least of the judges is required to be an advocate of the court or a barrister or pleader of not less than ten years' standing.

Besides the court of the Judicial Commissioner and the courts of small causes established under the Provincial Small Causes Courts Act of 1887, there are three other classes of civil courts, in this province, *viz.*, (1) court of the district judge, (2) court of the subordinate judge, 1st class and (3) court of the subordinate judge, 2nd class. By Act VIII of 1923 the court of the munsif was abolished and the court of the 2nd class subordinate judge substituted in its place. The pecuniary limit of the jurisdiction of the court of the munsif was normally Rs. 1,000 capable of being enhanced in special cases up to Rs. 2,000. The statutory limit of the jurisdiction of the second class subordinate judge has now been fixed at Rs. 5,000.

3. Certain features in the constitution of the courts created by the Central Provinces Courts Act are worthy of notice. The jurisdiction of the subordinate judge, 1st and 2nd class, appointed by the Local Government to a particular district, is not a restricted territorial jurisdiction confined to a sub-division of the district but extends throughout the entire civil district. So far as we are aware this is the most thorough attempt in India to unify the entire judicial staff of a whole district. Additional judges may be appointed or removed at will by a mere administrative order to suit the exigencies of the file of any particular court and an officer who is a judge of one court may be appointed an additional judge of another court or other courts.

Another convenience of this system is that it renders it possible to graduate the powers of second class subordinate judges on first appointment by progressive stages until they reach the maximum limit of Rs. 5,000. We have seen in an earlier chapter how the Judicial Commissioner by administrative order regulates the exercise of jurisdiction of second class subordinate judges according to their service and proved capacity, having due regard to the local needs of the district. It is an elastic system. On the one

hand the danger of investing second class subordinate judges on first appointment with powers to try suits up to the very high limit of Rs. 5,000 is avoided and on the other the concentration of a large number of courts at head quarters for the trial of suits exceeding a low money limit can be avoided by an adjustment of jurisdiction by an administrative order when local conditions require it. The question whether a given case is of a value higher than that provided by administrative order as the definition of a judge's powers should not be regarded as a question of jurisdiction so long as the value is under Rs. 5,000 but should be regarded as a matter to be set right by administrative order where necessary. If contest were to be allowed at the trial about such matters, much of the benefit of the system will be lost.

We have stated in an earlier chapter that this is the only province in India where there is a unification of the *sherista* of all the civil courts situated at a head quarter station. Plaints in every suit which lie in any of the courts at head quarters including the courts of small causes are presented in the first instance to the clerk of the court of the district judge who, after satisfying himself that they are properly stamped, drafted, signed and verified, enters them in his register of plaints and applications received and then transmits them to the proper court. This is again a practice which is rendered possible by the courts having no restricted territorial jurisdiction within the district under the local Civil Courts Act.

The original jurisdiction of first class subordinate judges in this province is, however, not unlimited as it is in most other provinces in India, but is restricted to a pecuniary limit of Rs. 10,000. On the other hand the Act renders possible the devolution of powers to any subordinate judge, first class, to try any proceedings under the Indian Succession Act 1865, the Probate and Administration Act 1881 and the Guardians and Wards Act 1890.

4. Rent suits under the Central Provinces Tenancy Act are tried by revenue officers who, for this purpose, exercise jurisdiction as subordinate judges. This work is divided territorially between tahsildars and naib tahsildars and the division is said to be advantageous to the parties for reasons of convenience and access. As many naib tahsildars have not passed the departmental examination in civil law, and as even tahsildars are not sufficiently trained in civil law and procedure, some witnesses pressed before us the desirability of transferring the trial of rent suits to the ordinary civil courts but the balance of convenience points to the present system being maintained.

5. The statistics of civil litigation in the province show that there were large increases in the number of suits for the first 25 years after the constitution of the province and during the next fifteen years litigation was either stationary or declining. In 1862 the total number of suits filed was 24,666. They had increased to 89,903 in 1881 and to 112,665 in 1886. In subsequent years there was a considerable decrease and in 1904 the total was 79,455. Since then there has been a gradual rise.. In the year 1921 the

number of institutions was 110,180 and in the year 1922, 127,038. The rapid decline in litigation towards the early part of this century is attributed mainly to the passing of the Tenancy Act of 1898, whereby the right of transfer of land was materially curtailed.

6. The character of litigation varies to some extent in the Central Provinces and in the Berars. In the Central Provinces even in important trading centres like Nagpur commercial suits are few as parties prefer to settle them out of court by means of panchayats. The bulk of the litigation is confined to petty suits below Rs. 100 in value. Mortgages generally provide for the sale and not for the fore-closure of the mortgaged properties. In the Berars, however, the commonest suits are those directly or indirectly connected with land, with questions of the right to be considered a member of the Deshmukh, Deshpande, Patelki or Patwari families and with cotton which is the staple industry of the district. Mortgages with the condition of fore-closure are common and those with the condition of sale rare. Suits are not uncommon to enforce a right of pre-emption and for a declaration in favour of mutation of khata. There are also suits for partition of ancestral property. The ginning and pressing of cotton in partnership leads to suits for dissolution of partnership and rendition of accounts and the *satta* system of speculation on the coming crops gives rise to suits, upon the losses so incurred, which provide the courts with a considerable amount of work.

7. The litigation in the trial courts is disposed of with a fair amount of expedition. The duration of trials has been speeded up to a remarkable extent in recent years owing, it is said, to the judges following the instructions issued from time to time by the Judicial Commissioner's court. Process-serving is very efficient mainly owing to the system of local inspection and check by a special grade of process-servers which unfortunately is under abolition owing to the needs of economy. We understand that the minimum standard of 80 per cent. of personal service is insisted upon in the case of all process-servers. The subordinate courts are also generally inspected by district judges who give personal attention to the mistakes of judges in a matter of procedure affecting duration. It is to be regretted that the number of inspections has had to be reduced in the interests of economy. The appellate work in the courts of district judges is also well in hand, the average duration of regular appeals being 120 days. There were in all 4,983 appeals before the district courts in the year 1922 of which 3,788 were disposed of during the year leaving a balance of 1,195 pending at the close of the year. This represents scarcely four months' work.

8. Delays, however, are most conspicuous in the court of the Judicial Commissioner itself. There were 402 first appeals before the court in 1922 of which 164 were disposed of leaving 238 pending at the close of the year. The average duration of first appeals was 418·7 days. There were 2,084 second appeals of which 943

were disposed of leaving a balance of 1,141 pending at the close of the year. The average duration of second appeals was 343·5 days. These figures are somewhat serious. The disposal figures for 1922 represent the total outturn of four experienced judges working without interruption the whole year. There were no unfilled leave vacancies or officiating appointments during the year. The pending file thus represents more than a year's work for four judges. We gather that definite dates are given for all cases and that dates are sometimes fixed as much as fifteen months ahead. Under this system a case that is not reached on its particular date appears to be in great danger of being adjourned for a very long time owing to intermediate dates having been already given for newer cases. If this Court cannot work by lists of cases set down for disposal in their order and must continue to try to fix cases for hearing on remote dates, it is very necessary that special attention should be given to and special arrangements made for cases that are not reached upon their proper dates.

9. The judges of the court of the Judicial Commissioner of the Central Provinces individually do more responsible work and labour under greater disadvantages than any judges of the highest court of appeal in any other province in India. All appeals—civil and a single judge except cases which are of Rs. 10,000 in value and capital cases which are tried by a bench. They are no longer supplied with any printed paper books which were *vetoed* by the local Legislative Council. They are furnished with type written copies of depositions. The pleadings are not translated or typed nor is any translation of documents made. Both judges and lawyers complained before us that the present system leads to waste of time and is false economy.

Note on Benami transactions.

The term *benami* is used ordinarily to describe a transaction which is real but where in place of the name of the actual person to be benefited the name of another person is inserted. There are, further, transactions also termed *benami* which are never intended to take effect.

2. Various motives induce people to place property in a false name. While all *benami* transactions may not have their origin in a present dishonest motive, particularly when property is acquired by one of the members of a joint Hindu family in the name of another member, there can be no doubt as to the fact that in the majority of cases, the real motive is to preserve the property from legitimate claims against it. Not unoften the transaction originates in the dishonest motive of defeating or defrauding creditors. Whatever may have been the reasons in the past inspiring *benami* transactions, at the present day the mass come into being as the result of discreditable motives. Such transactions result necessarily in obscuring the true title. In the words of Sir Frederick Pollock:—

> "The means of concealment which formerly were a shelter from the strong hand of princes and adventurers has been turned in peaceful times to the less ambitious but not the less lucrative end of defrauding creditors."

3. Such transactions bear a faint resemblance to cases based on the doctrine of the English law adopted in sections 82 and 84 of the Indian Trust Act, in which the legal estate vests in the man who pays the purchase money, or in the case of a transfer for an illegal purpose in the transferor who is not as guilty as the transferee. It is not possible under the Hindu or Mahommeden Law to distinguish a legal estate from an equitable one, nor does the ancient Hindu law recognize, as far as we are aware, such distinctions.

4. These transactions, even when not fraudulent in their inception, often afterwards lead to the perpetration of fraud upon innocent persons. Questions of great difficulty arise in distinguishing between real and *benami* transactions, as it is common experience that elaborate precautions are adopted to throw a veil of reality over every thing connected with the transaction and every stage of the subsequent conduct of the parties and the enjoyment of the property are so shaped as to correspond with the apparent ownership in its entirety. The transfer or conveyance is absolutely in favour of the apparent owner whose name appears as the transferee on the deed of transfer or conveyance. A deed of sale or gift duly signed and executed and registered, purporting to convey without any reservation the property covered by it to a certain person will be challenged, and it will be sought to show that it was never meant to convey the title to the nominal transferee. The first thing that the court is called upon to decide on such a plea is

who is the owner of the property? In arriving at a decision the court has to ascertain the intentions of the parties from an examination of the circumstances and probabilities of each case. Oral evidence is adduced and weighed with reference to a variety of circumstances and facts such as (1) the source from which the purchase money was derived, (2) the possession of the property, (3) the nature and character of the possession, (4) the position of the parties and their relation to one another, (5) the cicumstances of the alleged transfer, (6) the motive in making the alleged transfer, (7) the previous and subsequent conduct of the parties, and innumerable other circumstances which tend to confuse the issue and prolong proceedings. The examination of witnesses, recording their evidence and weighing their testimony on such pleas occupies a large portion of the time of the courts. Whether any and if so what portion of the consideration for an instrument did actually pass, whether parties are equally guilty and whether the fraudulent purpose was achieved partially or wholly are all issues arising for decision on pleas that a registered instrument evidenced a fictitious transaction. These points are incapable of being settled with any degree of uniformity and the case law which has grown around the legal maxim "In pari delicto, potior est conditio possidentis" is of bewildering volume and complexity. There is a distinct duty at present on the courts to enter into an exhaustive investigation as to what really is the truth when such a plea is advanced, despite the execution and registration of documents in solemn form.

5. *Benami* transactions loom into prominence also in the execution of decrees, in insolvency proceedings, in suits under Order 21, rule 63, and in lesser degree (but with not a little frequency so far as the waste of time occurs in law courts) in various other legal proceedings so as to contribute to delay. As observed by Justice Sir C. V. Kumaraswami Sastri, an eminent judge of the Madras High Court:—

> "So long as the law of joint Hindu family and the law as to *benami* transactions exist, it is difficult to see how execution of decrees cannot be delayed when the decree-holder wants to proceed against family properties."

6. With regard to the morality of such transactions, there is almost general agreement. It is pointed out by Sir George Campbell in explanation of the practice that a man who is not in need to cheat any one at present, may on some occasion desire to do so and that by putting his estate in the name of another under a secret trust can reserve himself a safe egress from possible future difficulties.

Where gentlemen holding properties *benami*, keep fictitious books, make false statements in petitions to Courts of justice and in their private correspondence for the purpose of concealing property from their creditors or for deceiving the members of their own family they have only themselves to blame and should not be surprised if they are not believed when for their own benefit they offer

themselves as witnesses in a court of justice openly and without shame avow that all that have been said and done were false and fictitious for the purpose of carrying into effect their own infamous designs.

7. From time to time statutory provisions have been made to discourage *benami* purchases at public sales, either by the civil courts or the revenue authorities. The provision in the Civil Procedure Code Act V/08 is contained in Section 66 which is as follows:—

> "No suit shall be maintained against any person claiming title under a purchase certified by the court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

Similar provisions are to be found in statutes relating to sales for arrears of revenue in many of the Provinces. The object is to prevent judgment debtors from purchasing their own property at auction in the name of another, and prohibit the real owner from ousting the certified purchaser on the strength of the actual character of the transaction.

8. In this connection it has also to be noted that sections 41 and 53 of the Transfer of Property Act are intended to, as far as possible, protect the interests of innocent third parties from the obscurity of title caused by property being placed in a false name. Section 41 of the Transfer of Property Act provides for the protection of purchasers for consideration from the owner of the property, notwithstanding that the real owner has no notice of that sale; provided that the transfer after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith. "The section is based on the principle that where one of the two innocent persons must suffer from the fraud of a third party, the loss should fall on him who has created or could have prevented that opportunity for the fraud and in such cases hardship is caused by the strict enforcement of the general rule that one can confer a higher right on property than he himself possesses." Cases frequently arise in which it is difficult to a degree to decide the question of burden of proof in suits falling within this section as contradistinguished from those falling under section 53 of the Act. It is impossible in our report to go into any detail as to the inadequacy of the remedy provided to innocent purchasers from ostensible owners of property. It is sufficient to indicate the actual misunderstanding of the existing statutory provisions in order to emphasise our recommendation that a system which all must acknowledge leads to incalculable mischief should cease to be.

Section 53 of the Transfer of Property Act is intended to check fraudulent transfers.

Similar provisions are to be found in the Provincial and Presidency Insolvency Acts which in certain circumstances have the effect of rendering voidable, transfers on the eve of insolvency.

" Any further transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall if the transferor is adjudged insolvent within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the court." Those who have actually worked this rule are in a position to testify to the numerous devices resorted to for defeating it, and our judicial tribunals before whom conflicting decisions, " reported " or not, are cited are placed in a quandary, where the distinction has to be drawn between cases where the fraud is inchoate and where it is perfected.

9. Section 423, Indian Penal Code, punishes the fraudulent insertion of false statements in deeds affecting property and aims in a measure at putting down *benami* transactions.

10. The law relating to negotiable instruments does not recognise the plea that a negotiable instrument has been taken *benami* for the benefit of the real person who advanced the money, as it is on the credit of the names appearing on it that it obtains circulation. In the case of such instruments, therefore, courts generally refuse to go behind the names expressly mentioned in the instrument, and to enquire whether the ostensible holder is or is not the real one. Such pleas used to be raised in former times but the public is now fully aware of the inability of courts to admit such pleas, and they have now almost disappeared.

11. We have so far indicated the cases which have been specially selected by the legislature for the purpose of enacting rules discouraging the purchase of property falsely in the name of one who is not the beneficial owner; but we have to remark that, notwithstanding all these provisions, it is common knowledge, that not infrequently cases come before the courts, in which what has to be decided is whether the property standing in a particular person's name is or is not really his, and oral evidence is let in on all the circumstances recounted in a previous portion of this chapter.

12. The plea that the transaction is not really what it appears to be or that a document was merely a sham one, as already pointed out, embodies an essentially different jurisdic conception from that of the ordinary *benami* transaction, but is still known by that name; but no ownership passes as the transaction is set forth and not intended to take effect at all. These sham transactions in some provinces give rise to a number of complicated suits which occupy not a little of the time of our courts, and the issues raised have to be very often decided on conflicting oral testimony. We think it is an affront to the dignity of courts and to the principles of justice of which they are the embodiment, that suitors should be allowed to come before them and say that deliberately and knowingly they entered into a transaction which they know to be dishonest, and that courts should help them to unravel the tangles, into which they wantonly got, and that they should be required to determine how far the fraud has been carried out and who is less guilty.

13. Under the actual conditions prevailing in this country there are no reasons to regard the practice of *benami* as sacrosanct. The observations of text-book writers of two or three decades ago and judicial dicta or obiter dicta of even a latter period, do not apply to present day conditions. There have been many changes, and the change continues. Owners of property who desire to deal with it know now their rights and are cautious in safeguarding them. People have become accustomed to the law relating to the transfer of property and registration so as to shape their transactions in immovable property to forms which make for certainty. They must not be encouraged to use these forms so as to disguise the facts of the transfer. What is essential at the present day is to strike at the root of the evil.

14. To picture the average Indian as a person afflicted with the morbid desire to obscure titles is a vast error. The suggestion that the *benami* system is ingrained in the Indian temperament has no foundation. It is based neither on correct understanding nor actual observation. There is no general desire to place property under false names, or to describe transactions other than as they are. The practice we deplore is confined mainly to those engaged in speculative ventures, to safeguard themselves against the consequences of failure.

15. We are not living now under conditions which necessitate the acquisition of property in the name of a faithful agent or a trusted servant. Prosperity requires no cloak. There is no inquisitor whom the honest rich man need fear. It is a delusion that most ladies in India cannot manage their own property. Nor is the juristic potency of the joint Hindu Family system any longer supreme. The family is rapidly giving way to the individual. The tendency is towards partition not union. If property is acquired by a member of a joint Hindu family in the name of another at the present time, it is so acquired probably to defeat the rights of the other members. If it is acquired in the name of a family Thakur or deity, the reason is to place the same in the category of " res extra commercium."

16. We were told by many that the system of *benami* is not altogether so immoral or fraudulent, as it appears, and that it is often necessary to resort to it in the ordinary course of affairs in Indian society, constituted as it is. We have been at pains to discover in what cases (if any) the system can serve a really useful purpose.

It was exceedingly difficult to obtain any thing approaching a comprehensible defence of the system. The best that could be urged was that in the case of *pardanashin* ladies or old and infirm men it was necessary that there should be some method by which they could purchase property in the names of others, in order to avoid a management for which their mental and physical deficiencies or the circumstances of their lives rendered them incapable. But the remedy here appears to be not in a transfer of a fictitious nature in

the name of a third party, but by such persons executing a power of attorney empowering an agent to act on their behalf in these respects. Some attempt was made to argue that such an agent might be untrustworthy. An unanswerable reply to that argument is that, if it is difficult for such a person to discover an honest agent, it will be even more difficult to discover an honest accomplice in a *benami* transaction. Agents are not always reliable, but they are more responsible. It is a matter of notoriety that a person, in whose name the transfer is made *benami*, as often as not, denies the real purchaser's title and asserts an independent ownership. The main argument that the *benami* system is to the advantage of pardanashin ladies or old and infirm men is refuted by the whole of the facts. No class or community suffers more under this system than these persons do.

It was next suggested in certain places that there was a common belief, that advantage accrued to a purchaser by having a purchase effected in the name of a person who was supposed to possess particular attributes in the way of good fortune. It was suggested to us that in certain parts of India it was considered auspicious to conduct these transactions by putting forward as transferees persons with lucky names. We do not consider that such a belief can exist to any great extent and, where it does exist, we do not consider that we give it too hard a name in calling it a superstition unworthy of an intelligent person. We do not think that, in order to gratify the very limited number who hold such an extraordinary idea, a considerable number of other persons should be permitted to suffer.

The position was taken by certain witnesses that it was not at all unfair that, if a man wished to conceal his prosperity from the world, he should be permitted to conduct his transactions in the names of other persons. We are unable to discover any occasions likely to occur in real life when an honest man would wish to conceal his prosperity from the world.

These are the grounds, such as they are, upon which the practice has been justified to us. They are the only arguments in its favour beyond the general argument that the authorities should move carefully in abolishing any thing as ancient as the system of *benami*. Reformers will always have difficulty in abolishing ancient abuses, but once it is determined that it is an abuse its antiquity should not be allowed to protect it. It certainly would be inequitable to a degree either to interfere with transactions that have already come into existence or to introduce prohibition without giving the parties likely to be concerned full notice. We do not, however, propose to adopt either course. Witness after witness admitted before us that the main purpose of these *benami* transactions is in most cases to screen the property from a creditor or a possible creditor. Persons beginning to trade, anticipating difficulties in the future, begin their business with a transfer of their existing properties in the name of some near relative. Members of a joint family trying to keep their self-acquisition from any possible claim by

other members of the family transfer to an outsider. The object is not always attained. Creditors may only be delayed by debtors placing their property in the name of an outsider or deity, or transferring it in trust for the benefit of the wife and children of the transferor.

There is a worse kind of *benami*. Dishonest officials, in order to conceal the extent of their gains or to evade the rules which prohibit their acquiring landed property in the places where they are engaged make purchases in the names of others.

17. We cannot accept the views of those who elevate the *benami* system into a custom. We consider it to be a morbid excrescence on the body politic. Those, whose conservative outlook objects to any interference with the existing system, have been unable to establish what benefits it confers on the community. The predominant view in most provinces—such of it as was definite—is in favour of some measure of reform calculated to restrict at any rate such transactions. We would not restrict. We would prohibit.

18. The result is not likely to cause real hardship to honest people. Prohibition should not be retrospective and should not be operative till a specified date. When the public comes to realise that by placing property in a false name they are not likely to keep the property to themselves nor place them beyond the reach of creditors and that courts of justice will not allow the plea of *benami* or " sham transaction " to be put forward, they will cease to make fictitious dispositions of property. The doctrine of " Resulting trusts " to which the *benami* system is often compared, was never intended to cover wilful fraud. It is one thing to say that if a person uses his position or opportunities against the will of another and utilises his money and purchases property in his own name, he should hold it for the person with whose money he purchased the property. His was manifestly dishonest conduct, and the law never helps a wrongdoer against an innocent person who has been defrauded. There may be a resulting trust in such cases and the property so purchased should be held for the benefit of the person. But it is a different thing to say that two persons can collude and bring into existence a transaction which both know is not to be what it seems to be. This ought not to be allowed by applying directly or indirectly the principles governing those obligations which are in the nature of trusts and provided for in Chapter IX of the Indian Trust Act. The time has come for putting an end to this mischievous system, however ancient. At the present day none of the phases of the *benami* system can brook the light of reasoned scrutiny on the test of social or political expediency. No reason urged so far for its continuance can bear critical examination from the point of view of the protection of the rights of the citizen or that of the interest of judicial administration.

19. We propose, therefore, a rule prohibiting all pleas from plaintiff or defendant or anybody couched so as to let in proof of the

unreality of duly executed and registered instruments. We recommend that it be enacted as follows:—

(1) Notwithstanding any statute, rule or law or usage to the contrary, no court shall entertain any plea by any party to a transaction, or his representative, that it was a sham or was not intended to be acted upon; or any plea that any person named in the document evidencing title was only a *benamidar* for himself or any one under whom he claims and had not the beneficial title and interest described therein, unless that person's name was inserted in it by means of fraud to which the person claiming was no party at all, or in circumstances involving no negligence on the part of such claimant.

(2) That the former provisions shall apply only to such transactions as come into existence on or after such date as the Local Government shall specify by notification published in such manner as it thinks fit sufficient to give the public notice of the coming into operation of such a provision.

(3) Nothing in the prohibition shall debar a member of joint Hindu family from pleading or proving that the property standing in the name of its *karta* or manager or any other member of the family belongs to the said family, or that the property in the name of a stranger to the family belongs to it, if the said member could not by due diligence have avoided the name or names being introduced in the documents referred to in section 1 or their being executed.

L. STUART.

T. DESIKACHARI.

TEJ BAHADUR SAPRU.

Note on "Benami transactions."

We are unable to assent to the recommendations made by our colleagues in their note on Benami Transactions. We agree with them as to the evils of the benami system and are satisfied, as they are, that benami transfers serve at the present time no legitimate purpose which cannot be as well or better served by more open methods. Apart, however, from other difficulties involved in their proposals it seems to us that the success of such proposals must in the last resort depend entirely upon whether the legislation which they recommend would or would not result in an abandonment of the objectionable practice now so widespread. Unless it results in an almost complete abandonment within a reasonably short time we think that the strain thrown upon our legal system would be very great in more ways than one, and that neither expedition, economy, certainty nor justice would be improved. It is not our wish to dogmatise as to the reasonableness of expecting the suggested legislation to lead to a change—fairly swift and fairly complete—in the habits or practice of the Indian people as regards title to property. We are content to say that we are far from being satisfied that such a result is probable, and that on no other terms are we prepared to recommend as a measure of "law reform" that the law should refuse to recognise the resulting trusts.

G. C. RANKIN.
F. X. DESOUZA.
H. P. DUVAL.

Résumé of Recommendations.

I. Recommendations that require legislative action.

II. Recommendations that can be carried into effect under the Rule-making power conferred on High Courts by Part X of the Code of Civil Procedure.

III. Recommendations that require action by High Courts under other Rule-making powers or by administrative orders.

IV. Recommendations that require the sanction of the Government of India.

V. Recommendations that require action by Local Governments.

VI. Recommendations for consideration by presiding officers of Courts.

NOTE.—We have classified our recommendations as above in the hope that this method will be found convenient, but we desire to point out that an amendment of the Rules of the first schedule to the Civil Procedure Code may in some cases be better or more safely made by legislation. This observation applies also to certain items under the third heading. The facilities for collecting opinion and the desirability of uniformity are matters which require to be considered in deciding as to the most suitable method. Our classification is not intended as a final expression of opinion as to this. Some of the recommendations under the third heading have been repeated under the fifth heading, as they involve action both by the High Courts and by the Local Governments. We have not included in this résumé all of the minor suggestions which the report contains.

I.

Recommendations which require legislative action.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
1	1 9	22 18—27	Creation of post of registrar in districts with quasi-judicial powers. (This proposal may not in all circumstances require legislative action.)
2	7 Sec. I	8	Amendment of the Religious Endowments Act (XX of 1863) in such a manner as to permit suits brought under it to be heard and determined by subordinate judges and munsifs.
3	7 Sec. I	9	Amendment of the Madras Civil Courts Act (III of 1873) to enable contested proceedings under the Indian Succession Act, X of 1865, and the Probate and Administration Act, V of 1881, to be transferred to subordinate judges and munsifs for hearing and determination.
4	7 Sec. I	11	Amendment of the local Acts where necessary to provide for the hearing and determination of matters under the Guardian and Wards Act, VIII of 1890, by subordinate judges and munsifs.
5	7 Sec. II 27	5 5	Amendment of section 102, Act V of 1908, by raising the limit from Rs. 500 to Rs. 1,000.
			Amendments in the Provincial Small Cause Court Act (IX of 1887).
6 (i)	7 Sec. III	2	(i) Amendment in the Second Schedule of Article 4.
6 (ii)		3	(ii) Amendment in the Second Schedule of Article 6.
6 (iii)		4	(iii) Amendment in the Second Schedule of Article 8.
6 (iv)		5	(iv) Amendment in the Second Schedule of Article 18.
6 (v)		6	Amendment in the Second Schedule of Articles 20 and 21.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
6 (vi)	7 Sec. III	7	(vi) Amendment in the Second Schedule of Article 25.
6 (vii)		8	(vii) Deletion of Article 26.
6 (viii)		9	(viii) Amendment of Article 31.
6 (ix)		10	(ix) Deletion of Article 35 (ii).
6 (x)		10	(x) Deletion of Article 43 (*A*).
6 (xi)		11	(xi) Amendment of Article 13.
6 (xii)		11	(xii) Amendment of Article 38.
6 (xiii)		13	(xiii) Addition of a provision in the Act to give authority to a district judge to transfer certain cases for trial under ordinary procedure.
6 (xiv)	28	9	(xiv) Addition of a provision requiring deposit of the decretal amount as a condition of filing an application under section 25.
7	7 Sec. IV	9	Amendment of Civil Courts Acts in all provinces, except Bombay and the Central Provinces, to enable provision to be made for increase in the jurisdiction of munsifs or corresponding officers. Compare Chapter 59.
8	7 Sec. V	27	Amendments in the local acts where necessary in order to confer exclusive jurisdiction in certain classes of cases upon village courts.
9	8	22	Amendment of the Legal Practitioners Act (XVIII of 1879) so as to enable presiding officers of subordinate courts to make enquiries with the view of proclamation of touts, to amend the definition of a tout, and to make the continuance of touting after a man has been proclaimed a criminal offence.
10	9	12	Amendment of the law where necessary to secure better division of duties amongst courts and to abrogate territorial system where necessary.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
11	13	13-18	*Amendments in the Indian Arbitration Act (IX of 1899)* to provide that all questions relating to the submission should be determined by the court of the town in which the arbitration proceedings were held, the addition of a provision like that contained in the seventeenth paragraph of the Second Schedule of Act V of 1908, and a prohibition of injunctions to restrain arbitration proceedings.
12	13	19	Further amendment in Act IX of 1899 on the question of appeal and certain other points.
			Amendments in the Second Schedule, Act V of 1908 (Arbitration), to provide—
13 (i)	13	20	(i) that all arbitrations in suits except as provided by the Second Schedule be disregarded and recorded as adjustments only if all parties consent;
13 (ii)	13	21	(ii) that power be given to the courts to grant leave *ex post facto* validating an award on submitted matters other than matters in difference in the suit;
13 (iii)	13	22	(iii) that an order setting aside an award and superseding an arbitration should not be impeached in an appeal from the decree;
13 (iv)	13	23	(iv) that attacks upon the conduct of an arbitrator should only be entertained after the award has been made, except upon the point as to whether the time for filing the award should be further extended;
13 (v)	13	25	(v) that the court should be given similar powers in respect of an award filed under the provisions of paragraph 20 of the schedule as it has in respect of an award made under an order of reference on agreement to refer under paragraph 14 of the schedule.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
			Amendments in the Provincial Insolvency Act (V of 1920).
14 (i)	14	15	(i) Insertion of a provision, similar to the provision in section 36, Presidency Towns Insolvency Act (III of 1909), by which the court shall have power to examine a third party, such power to be given to courts by special order of the Local Government and to be capable of deputation to a registrar, where such officer is appointed.
		"	
14 (ii)	14	16	(ii) Amendment of section 70 to improve the procedure in insolvency prosecutions.
14 (iii)	14	19	(iii) Insertion of provisions similar to the provisions in sections 88 and 89 of the Presidency Towns Insolvency Act to enable the court to appoint committees of inspection.
14 (iv)	14	21	(iv) Amendment of section 34 (*3*) to provide that the receiver and not the insolvent shall be the proper person to contest proofs of debt.
14 (v)	14	23	(v) Adaptation of the insolvency law to the special privileges of certain agriculturists under local laws.
14 (vi)	14	24	(vi) Restriction of official receivers' powers under section 80 (*a*), (*c*), (*d*).
14 (vii)	14	26	(vii) Clearing up the law as to the position of insolvents who are the heads of Mitakshara families.
			Presidency Towns Insolvency Act (III of 1909).
15 (i)	14	22	(i) That it should be extended to Karachi.
15 (ii)	14	38	(ii) Amendment of section 104 as to prosecutions for insolvency offences.
16	15 Calcutta	14	That all reference to Order XXXVII, Act V of 1908, be deleted from the Negotiable Instruments Act (XXVI of 1881).
17	15 Madras	4	Increase in the jurisdiction of the City Civil Court.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
18	15 Bombay	8	Increase in jurisdiction of the Presidency Small Cause Court in Bombay.
19	15 Karachi	9	Conversion of the Small Cause Court in Karachi into a Presidency Towns Small Cause Court.
20	15 Karachi	10	Introduction of a "remitted action" system into Karachi and Rangoon.
	Rangoon	14	
			Presidency Small Cause Courts Act (XV of 1882).
21 (i)	17	11	(i) Provision of an appeal on law to the High Court in cases tried by Chief Judge.
21 (ii)	17	26	(ii) Provision authorising the requirement of security as a condition of an application to set aside an *ex parte* decree or for a new trial.
21 (iii)	17	29	(iii) Amendment of section 19 (*e*) (in the Rangoon Act also).
			Appeals.
22	22	4-10	Constitution of District Appellate Benches in certain provinces to hear and determine finally appeals against decrees in all original suits when the amount or value of the subject matter does not exceed one thousand rupees with an appeal to the High Court in event of difference of opinion and a power to state a case on a point of law.
23	24	8	Restriction of Letters Patent appeals on the lines of Rangoon Letters Patent (this may be done by legislation or otherwise).
24	25	7-9	Provisions by which no second appeal is allowed except by special leave (see dissenting note of Sir Desikachariar).
25	27	2-4	Amendment of sections 98 and 103 of Act V of 1908.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
			Revision.
26	28	12, 19, 21	Alteration of the law to show unmistakably that no revision lies except as provided in Act V of 1908 and other statutory law, and to amend section 115 as regards revision of interlocutory orders, and otherwise.
			Execution.
27 (i)	29	5	(i) Alteration of the law to prohibit entertainment of a plea advanced by the judgment-debtor that the decree-holder had agreed that a decree should not be executed.
27 (ii)	29	8	(ii) Alteration of the law to prohibit an appeal, except by special leave, on the ground that a decree has been improperly drawn up when the objection has not been taken in the court passing the decree at the proper time.
27 (iii)	29	14	(iii) Amendment of the law to enable different courts to execute the same decree concurrently.
27 (iv)	29	15	(iv) Amendment of the law to enable a court to which a decree has been transferred to transfer it for execution to another court.
27 (v)	29	15	(v) Amendment of the law to give the court to which a decree has been transferred the same powers in execution as the court which passed the decree.
27 (vi)	29	23	(vi) Amendment of section 60 (*h*), Act V of 1908.
27 (vii)	29	26	(vii) Increase of court-fee on suits filed in accordance with Order XXI, rule 63.
27 (viii)	29	27	(viii) A clear pronouncement of the law that orders settling a sale proclamation under Order XXI, rule 66, are purely administrative and not appealable or open to revision.
27 (ix)	29	33	(ix) Amendment of section 74, Act V of 1908, by addition of the words "or at his instigation" after the words "on his behalf."

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
27 (x)	30	2	(x) *In section 47, Act V of 1908.* (*a*) Amendment so as to make questions between a stranger purchaser and parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree questions which are to be determined by the court executing the decree and not by a separate suit. (*b*) Amendment as regards certain parties dismissed from the suit. (*c*) Restriction of the right of appeal against decisions under section 47, by making certain orders non-appealable, insisting in certain instances on a deposit of the decretal amount or the filing of security as a condition of appeal, and allowing no second appeals except by leave.
27 (xi)	30	4	(xi) Amendment of section 48, Act V of 1908, with a corresponding alteration in Article 182, First Schedule of the Limitation Act (IX of 1908), to bar execution after six years except by special leave of the court, to be given on certain grounds and under certain conditions.
27 (xii)	30	5	(xii) Amendment of section 66, Act V of 1908, to apply not only to plaintiffs but also to defendants who at the time of the suit are not in possession of the properties sold in auction.
27 (xiii)	30	7	(xiii) Conferment on civil courts of authority similar to the authority granted by section 72, Act V of 1908, to the Collector.
27 (xiv)	30	8	(xiv) Amendment of section 73, Act V of 1908, to give advantages at the time of rateable distribution to the creditor who has taken out execution.
27 (xv)	30	9	(xv) Amendment of section 145, Act V of 1908, so as to give the court power to realise the security by execution in the suit or proceeding itself without a fresh suit, power being reserved to relegate the creditor to a fresh suit as a precaution to meet cases of special complication.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
27 (xvi)	30	10	(xvi) Amendment of section 152, Act V of 1908, to give authority to a court to which a decree has been transferred for execution to correct clerical or arithmetical mistakes or errors arising from an accidental slip or omission when they are apparent on the face of the decree or order sought to be executed and the judgment on which it is based.
		"	
27 (xvii)	31	3	(xvii) Extension of the principle of section 21, Act V of 1908, to execution proceedings.
28	35	16	*In respect of the doctrine of part performance.* (*a*) Definition by legislative enactment of the contractual effect of an instrument purporting to be a conveyance but void, as such, for want of registration. (*b*) A legislative enactment providing that in the absence of twelve years' possession no claim to immovable property under an unregistered transfer be recognised except as a basis for a suit for specific performance brought within due time.
			Partition.
29	36	9	That in the case of any joint Hindu family if the immovable property belonging to the joint family exceeds the value of Rs. 1,000— (*a*) no separation of interest so as to make the members of the family or any of them cease to be undivided shall be effected, otherwise than by a registered instrument, whether any actual division of property be or be not made or agreed on in connection therewith; (*b*) no partition of the whole or any part of the immovable property belonging to such family shall be valid unless the same be made by registered instrument. Exception from these requirements shall be permitted in the case of any decree or order of court, and any instrument of partition made by a revenue officer.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
30	36	17	Legislative enactment requiring that in the case of persons governed by Hindu Law— (*a*) surrenders by a widow, (*b*) releases by a coparcener, (*c*) family settlements, and (*d*) grants for maintenance, shall be effected only by a registered instrument.
			Partnerships.
31	37	8-9	Legislative enactment requiring registration of contractual partnerships in cases in which the capital at the commencement of the partnership exceeds Rs. 500, omission to register being made punishable as an offence; failure to register to entail however only the refusal of civil courts to decide disputes as between the partners themselves. Unregistered partnerships would not be treated as illegal associations incapable of suing or being sued as such.
			Probate and administration.
32 (i)	38	7	A legislative enactment requiring wills made by Hindus to be everywhere in writing and attested.
32 (ii)	38	8	Insistence on probate of such wills if the question of court-fee on probate can be accommodated.
33	38	9	Extension of powers to grant certificates under Administrator General's Act (III of 1913).
34	39	3	Amendment of the law as to *attestation of mortgage deeds.*

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
			Suits by reversioners on the death of a Hindu female heir.
35	40	15	To enact unmistakably that suits brought by a reversioner during the lifetime of a limited owner for a declaration that the latter's alienation does not bind the reversion are representative suits in the full sense of the term, to amend the law of limitation applicable thereto and to provide that suits for possession by the ultimate reversioner must, save in certain circumstances, be brought within twelve years of the date of the alienation, provision being made to guard the interests of minors and others. *Cf.* Articles 125, 141, First Schedule, Act IX of 1908.
36	40	16	Amendment of the law to extend the power of alienation by a Hindu widow in certain cases.
			Limitation Act (IX of 1908).
37 (i)	41	3	(i) Amendment of section 14.
37 (ii)	41	4	(ii) Amendment of section 19.
37 (iii)	41	4, 5, 6	(iii) Amendment of section 20.
37 (iv)	41	7	(iv) Amendment of Article 5, First Schedule.
37 (v)	41	8	(v) Amendment of Article 47, First Schedule.
37 (vi)	41	9	(vi) Amendment of Article 85, First Schedule.
37 (vii)	41	10	(vii) Amendment of Articles 92, 93, 95, 96, First Schedule.
37 (viii)	41	11	(viii) Amendment of Article 109, First Schedule.
37 (ix)	41	12	(ix) Amendment of Article 113, First Schedule.
37 (x)	41	13	(x) Amendment of Article 128, First Schedule.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
37 (xi)	41	14	(xi) Amendment of Article 132, First Schedule.
37 (xii)	41	15	(xii) Amendment of Article 166, First Schedule.
37 (xiii)	41	16	(xiii) Amendment of Article 133, First Schedule.
37 (xiv)	41	16	(xiv) Amendment of Article 134, First Schedule. (For Article 182, see item 27 (xi) above.)
			Indian Evidence Act (I of 1872).
38 (i)	42	1	(i) Amendment of sections 11 and 13.
38 (ii)	42	1	(ii) Amendment of section 32.
38 (iii)	42	2	(iii) Amendment of section 35.
38 (iv)	42	3	(iv) Amendment of section 44.
38 (v)	42	4	(v) Amendment of section 65.
38 (vi)	42	5	(vi) Amendment of section 68.
38 (vii)	42	6	(vii) Amendment of section 74.
38 (viii)	42	7	(viii) Amendment of section 78.
38 (ix)	42	8	(ix) Addition of a section regarding the presumption arising from the registration of a document.
38 (x)	42	1	(x) Amendment of section 157.
39	43	26	Amendment of the law to make agreements of a champertous nature voidable under the Contract Act (IX of 1872) at the instance of the person financed, on condition that he refunds the consideration with interest to be fixed by the court.
40	46 10	13 27	Legislation to make applicable to appeals in India the principle of Order 45, rule 9A of the First Schedule of the Code of Civil Procedure, *viz.*, dispensing with substitution of representatives of parties who did not appear at the trial, by leave of the court.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
41	47	5	Revision of existing codes—in particular of the Transfer of Property Act and the Indian Contract Act.
42	48	10	Amendment of law relating to appeals in the Bengal Tenancy Act.
43	50	5	Amendment of the Madras Civil Courts Act to make provision for the appointment of additional or joint judges.
44	50	6	Provision enabling the Madras High Court to grant greater powers under the Provincial Small Cause Courts Act.
45	52	5	Amendment of section 32 of Bombay Civil Courts Act.
46	52	8	Amendment of Dekkan Agriculturists' Relief Act.
47	58	6	Registration of adoptions in Burma.

II.

Recommendations which can be carried into effect under the Rule-making power conferred on High Courts by Part X of the Code of Civil Procedure.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
			Processes.
1 (i)	1 10	14 2	(i) Rule directing that necessary copies of the plaint or abstract should be filed with the plaint.
1 (ii)	1 10	14 2	(ii) Rule directing that process fees should be paid with the plaint.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
1 (iii)	10	3	(iii) Rule directing processes to be prepared by the parties themselves on forms supplied by court.
1 (iv)	10	20	(iv) Amendment of O. V, rule 15, by substituting for the words "the defendant cannot be found" the words "the defendant is absent," and a provision to bring out that service on an adult male member under rule 15 is not due service in any case in which such adult male member has an interest adverse to that of the defendant in the subject matter of the suit. (The latter may require legislation.)
1 (v)	10	22	(v) Amendment of O. IX, r. 13, by insertion of a clause that no court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of the summons if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim.
1 (vi)	5 10	3 24	(vi) Introduction of the system of "registered addresses" by which the plaintiff must file the address which will find him under penalty of having his suit dismissed, and the defendant must file a similar address under penalty of having his defence struck out. Such registered addresses to hold good in interlocutory proceedings, throughout appellate stages and in execution for two years after final decision.
1 (vii)	10	23	(vii) O. III, r. 5, to be amended to show clearly that service on pleaders other than those who plead without acting shall be service on parties.
1 (viii)	1 10	13 25	(viii) Rules to be made for the service of summonses by registered post in certain cases.
1 (ix)	10	26	(ix) Rule to permit in certain cases and under certain restrictions of the service of processes by vakils' clerks.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
1 (x)	10	27	(x) Rule to be made by which in certain appeals and interlocutory matters the issue of certain processes may be dispensed with.
1 (xi)	10	28	(xi) Rule to be made by which parties may be allowed to serve processes on their own witnesses.
2	1	15	Adoption of additional form of summons for appearance and directions.
3	1 (appendix)	8, 9	Alteration of procedure in certain *ex parte* proceedings.
4	3	20-23	Alteration of the rules providing for the production of documentary evidence with special reference to Discovery and Admission.
5	4	4	Framing rules under which the courts will be permitted to direct the parties in certain instances to file lists of witnesses.
6	4	9	Alteration of the rules relating to the recording of evidence so as to permit selected officers to take a "long note" which will be the sole record.
7	5	7	Amendment of O. XXXII, r. 4 in respect of guardians "*ad litem*", to effect the result that the consent of the natural guardian to the appointment will be presumed, and, in event of his refusal or incapacity to act, an officer of court or some other qualified person be forthwith appointed guardian "*ad litem.*"
8	5	9	(i) Amendment of the rules to provide that certain Commissioners may be appointed under O. XXVI, r. 4 with the powers to control the examination of the witnesses given to a court under the provicions of sections 135, 138, 142, 144, 145, 148, 150, 151, 152, 154, 156, 157, 159, 162 of Act I of 1872, subject to a right of appeal. (It is for consideration whether legislation is not necessary and desirable). (ii) That other Commissioners may be appointed under O. XXVI, r. 4 who do not possess these powers.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
			(iii) That Commissioners appointed under (i) should be supplied as far as possible with the necessary materials to assist them in performance of their duties.
9	12 17	16, 17 22	Extension of summary procedure to subordinate courts in cases on negotiable instruments and in other cases.
10	15 Calcutta	7	That in the High Court in Calcutta the period of ten days allowed under O. XI, r. 17 be reduced to seven days.
11	26	1	Addition to the rules of a provision requiring security for costs as a condition of admitting a second appeal.
			Execution.
12 (i)	29	8	(i) Addition to the effect that pleaders must sign a decree when they are satisfied that it is in conformity with the judgment.
12 (ii)	29	12	(ii) Amendment of O. XXI, r. 11, para. 2.
12 (iii)	29	13	(iii) Amendment to permit a decree holder to apply to the court, within whose jurisdiction the judgment debtor is to order immediate execution on the production of the decree and an affidavit of non-satisfaction, pending an order of transfer from the court who passed the decree.
12 (iv)	29	16	(iv) Amendment of rules as to notice on judgment debtors; specially by amendment of O. XXI, r. 22 (*a*), increasing the period within which notice need not be issued from one year to three.
12 (v)	29	22	(v) Amendment of O. XXI, r. 68 by reduction of the period from fifteen days to a week.
12 (vi)	29	22	(vi) Addition of rules in O. XXI to provide something in the nature of a garnishee procedure.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
12 (vii)	29	24	(vii) Amendment of O. XXI, r. 54 to give effect to an order of attachment as against those claiming as volunteers under a judgment debtor from the date of the order for attachment and as against others from the time they had knowledge of the passing of the order.
12 (viii)	29	25	(viii) Substitution for O. XXI, r. 58 (2) of a rule providing for the court postponing delivery of the property to the purchaser pending investigation of the claim. or, An addition to O. XXI, r. 58 (2) of a condition that the sale can only be postponed on a deposit of the sale warrant amount or of a reasonable estimate of the value of the property to be sold.
12 (ix)	29	25	(ix) Addition of a provision making an order under O. XXI, rr. 60 and 61 conclusive not only as regards the particular attachment in respect of which the claim is made but as regards the execution of the decree in future, unless either party can set up a title subsequent to the date of the order.
12 (x)	29	28	(x) Reduction of the minimum period in O. XXI, r. 68 from thirty to fifteen days.
12 (xi)	29	30	(xi) Substitution of a period of thirty days for seven days in O. XXI, r. 69 (2).
12 (xii)	29	31	(xii) Modification of O. XXI, r. 89 so as to allow any person to pay in the money who claims any interest in the property sold at the time of the sale or at the time of the petition or who is acting for or in the interest of such person.
12 (xiii)	29	32	(xiii) Amendment of O. XXI, r. 90 to provide that no application to set aside a sale be admitted— (*a*) unless it discloses a ground which could not have been put forward by the applicant before the sale was conducted.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
			(*b*) unless the applicant deposits with his application the sale warrant amount or an amount equal to the amount realised by the sale (whichever is less) or in event of amendment of section 145, see I. 27 (xv) security for the amount.
12 (xiv)	29	33	(xiv) Amendment of O. XXI, r. 98 to provide that when a person obstructing is sent to jail his detention be at the cost of the Crown and the addition of the words " or on his behalf " after the words " at his instigation."
12 (xv)	29	33	(xv) Amendment of O. XXI, r. 99.
12 (xvi)	30	11	(xvi) Deletion from O. XXI, r. 16 of the provision which requires notice of the application to be given to the judgment debtor, and an amendment providing that execution may issue if an affidavit by the decree holder admitting the transfer is filed with the application.
12 (xvii)	30	12	(xvii) Amendment of O. XXI, r. 17 confining the power to reject only to cases in which the defects are not amended within the time allowed.
12 (xviii)	30	13	(xviii) Amendment of O. XXI, r. 24 (3) by addition of the words " and a day shall be specified on or before which it shall be *returned* to court."
12 (xix)	30	14	(xix) Amendment of O. XXI, r. 26 (3) to make security obligatory unless sufficient cause is shown to the contrary.
12 (xx)	30	15	(xx) Amendment of O. XXI, r. 31, reducing the period of six months to three but giving the court power to extend the time.
12 (xxi)	30	16	(xxi) Amendment of O. XXI, r. 32 (3) by fixing a minimum of three months and a maximum of one year.
12 (xxii)	30	18	(xxii) Amendment of O. XXI, r. 39 by deleting the words " in the civil prison " in clause (5).

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
12 (xxiii)	30	19	(xxiii) Amendment of O. XXI, r. 45 by the addition of a direction for prepayment of the charges for watching the crop.
12 (xxiv)	30	20	(xxiv) Amendment of O. XXI, r. 53 by—
		"	(*a*) adding in sub-clause 1 (3) after the words "to such other court" the words "and to the court to which it has been transferred for execution." Adding at the end of sub-clause 1 (3) (ii) the words "with the consent of the said decree holder expressed in writing or the permission of the attaching court."
	30	21	(*b*) and substituting in sub-clause (6) the words "with the knowledge thereof" for the words "after the receipt of notice thereof."
12 (xxv)	30	22	(xxv) Amendment of O. XXI, r. 57, by an addition requiring the court to state in every order dismissing an application in execution in which there is an attachment whether the attachment continues to exist or ceases to exist.
12 (xxvi)	30	23	(xxvi) Amendment of O. XXI, r. 67 by deleting the implied provision that it is necessary to send a copy of the sale proclamation to the judgment debtor.
12 (xxvii)	30	24	(xxvii) Amendment of O. XXI, r. 72, by deletion of clauses (1) and (3) and substitution in clause (2) for the words "with such permission" the words "property sold."
12 (xxviii)	30	25	(xxviii) Adoption of the Punjab High Court amendment to O. XXI, r. 75 (2).
12 (xxix)	31	6	(xxix) Amendment of O. XXXIX, r. 1 by deletion of the words "or wrongfully sold in execution of a decree" from (*a*).

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
12 (xxx)	32	2	(xxx) Amendments in O. 34 to give discretion to courts in the matter of preparation of decrees on mortgages, attachments, etc.
13	43	27	Amendment in the rules to enable the court to insist on security for the defendant's costs in champertous cases as a condition precedent to the plaintiff proceeding with the suit (Oudh).
14	44	2 and 4	Fuller provision for recovery of necessary costs as between party and party.
15	50	17	Amendment of O. XII, r. 6 and O. XV, r. 2 (with special reference to Madras).
16	50	17	Amendment of O. XVIII, r. 2 (with special reference to Madras).
17	50	17	Amendment of O. XIII, r. 9 (with special reference to Madras).

III

Recommendations which require action by High Courts under other Rule making powers or administrative orders.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
1	1	13	Improved co-ordination between the court issuing a process on a person outside its jurisdiction and the court receiving it.
2	1 9 48	22 16-27 16	Creation of posts of registrar in courts in districts :— (*a*) to assist district judges in administrative work. (*b*) —$^{\text{and}}_{\text{or}}$ to assist other courts in administrative work. (*c*) $^{\text{and}}_{\text{or}}$— to perform duties of a judicial nature.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
			The creation of the post can be in case (c) by legislative enactment but can be also effected by administrative order conferring judicial powers on such registrar under the provisions of the Act having application.
3	1	22-23	Division of duties between presiding officers of courts situated in the same place.
	9	12-14	
4	1	23	(Co-ordination of court offices.)
	9	12-14	
5	4	14	Entertainment of stenographers to whom judgments can be dictated.
6	4	14	Provision for returns of suits and appeals in which judgments have not been delivered within a month of the final hearing of arguments.
	34	28	
			Processes.
7 (i)	10	4	(i) Rules to be framed when necessary for the more systematic distribution of processes for service either on the beat system or otherwise, and the preparation of statements, diaries and returns to assist this object.
7 (ii)	10	8-12	(ii) Abolition of the system (where it exists) under which the person wishing to have a process served must supply an identifier to accompany the process server and substitution of a system by which identification is arranged by the authorities, the party only be asked to assist as a last resort.
		21	
	48	19	
	49	11	
7 (iii)	10	14-16	(iii) Rules, where necessary, to provide for more efficient supervision over the work of process servers.
7 (iv)	10	17	(iv) Central nazarats to be constituted where not existent.
7 (v)	10	18	(v) Improvement in the pay, etc., of process-servers.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
8	5 5	8 10	Alteration in the rules under which lists are kept up of persons ready to accept commissions under Order XXVI, rule 4 and as to selection of such persons.
9	5	11	Improvement of the "amin" system where existent and its restoration in certain places.
10	5	12	Improvement in the selection of commissioners appointed under Order XXVI, rules 11 and 12 to examine accounts.
11	7 Sec. I	6	Transfer of criminal work from sessions judges to selected subordinate judges who will be given criminal powers.
12	7 Sec. I	9	Increased appointment of district delegates under the Indian Succession Act, X of 1865 and the Probate and Administration Act, V of 1881, and increased use of the power to delegate contested work in Bengal, Bihar, Agra, Bombay, the Punjab and the Central Provinces under the Local Civil Courts Acts.
13	7 Sec. II	6	Re-arrangement of territorial jurisdiction of Provincial Small Cause Courts.
14	8	8-10	Improved training of members of the Bar by an insistence on instruction in chambers as a qualification for practice.
15	8	13-14	Alterations in the rules as to fees chargeable by members of the Bar, with particular reference to recovery as taxed costs.
16	11	5-11	Alteration in the system of selecting officers as munsifs, subordinate judges or township judges on first appointment.
17	11	12-17	Improved training of such officers after first appointment.
18	12	15	Training of judicial officers to enable them to take charge of commercial courts.
			Provincial Insolvency Act V of 1920.
19	14	22	The necessity of improvement in the administration of the office of the official receiver in Karachi.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
20	14	29-31	Reconsideration of the methods in the Madras High Court as to proceeding in insolvency against mortgagees and debtors of insolvents.
21	14	36	The extension of the right of audience to attorneys in insolvency.
			Suggestions as to the work of High Courts on the Original Side.
			Calcutta.
22 (i)	15 Calcutta.	5	(i) That the writ of summons, if prepared by the plaintiff's attorney and filed with the plaint might be required to be delivered to the Sheriff for service within seven days. That the rule should be deleted which requires a translation of the writ to be made in the Sheriff's office, exception being made if necessary, in cases under Order 37.
22 (ii)	15	6	(ii) That certain selected solicitors' clerks be authorized by the Sheriff to serve processes.
22 (iii)	15	13	(iii) That the present practice under which a plaint has to be filed in suits in which an originating summons is issued be discontinued, that no plaint need be filed and the originating summons shall be drawn up by the attorney for the plaintiff.
22 (iv)	15	14	(iv) That rules should be made that in exercise of the summary procedure provided by Order XXXVII in a suit on a Bill of Exchange or Negotiable Instrument interest can be recovered only as provided in the document or, if the document is silent on the point, at six per cent., as provided in the Negotiable Instruments Act (XXVI of 1881) and that the Court shall have the same power as to *interim* interest and interest on the decree as under the ordinary procedure.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
22 (v)	15	16	(v) That a rule should be made to the effect that *interim* interest may be given by way of damages in a suit where the claim rests in damages up to twelve per cent. without evidence having been called to justify a particular rate, but that it should not be allowed at a higher rate without specific evidence.
22 (vi)	15	20	(vi) That the summons for directions be introduced with special reference to its use in commercial cases.
			Madras.
23 (i)	15 Madras.	7	(i) Remodelling of the procedure in trial of suits in High Courts and abolition of the Issue Court.
23 (ii)	15	9	(ii) Appointment of a "master" to relieve judges and further delegation of powers to the registrar or master in interlocutory and miscellaneous proceedings.
23 (iii)	15	15	(iii) Extension of the procedure for obtaining summary judgment.
23 (iv)	15	16	(iv) Alteration of the system of calculating costs and fees in account cases.
23 (v)	15	17	(v) Introduction of the system of "originating summons."
23 (vi)	15	18	(vi) More careful preparation of the cause lists.
			Bombay.
24 (i)	15 Calcutta.	13	(i) That the present practice under which a plaint has to be filed in suits in which an originating summons is issued be discontinued, that no plaint need be filed and the originating summons shall be drawn up by the attorney for the plaintiff.
24 (ii)	15 Bombay.	9-11	(ii) Improved office arrangements.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
24 (iii)	15	14	(iii) Abolition of the time-limit for commercial causes.
24 (iv)	15	16	(iv) That the summons for directions be introduced with special reference to its use in commercial causes.
24 (v)	15	17	(v) That the practice of annexing copies of lengthy correspondence to the plaint be discouraged.
24 (vi)	15	18	(vi) That the method of maintaining cause lists be improved.
24 (vii)	15	20	(vii) That the evidence be taken down in shorthand.
			Rangoon.
25 (i)	15 Rangoon.	2	(i) Improvement of office staff.
25 (ii)	15	3	(ii) Employment of special bailiffs.
25 (iii)	15	5	(iii) That the summons for directions be introduced with special reference to its use in commercial causes.
25 (iv)	15	6	(iv) Expedition in filing written statements.
25 (v)	15	8	(v) Improvement in the system of recording evidence.
25 (vi)	15	9	(vi) Increased supervision over the return of commissions.
25 (vii)	15	12	(vii) Special check over medical certificates.
25 (viii)	15	13	(viii) Utilization of powers under O. XXXVII, Act V of 1908.
			Karachi.
26 (i)	15 Karachi.	5-14	(i) Improvement of staff.
26 (ii)	15	6-11	(ii) Improvement of cause lists.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
26 (iii)	15	7	(iii) Necessity of hearing suits "de die in diem."
26 (iv)	15	11	(iv) Improvement in working arrangements.
26 (v)	15	12	(v) Retention of execution work in the hands of one judge.
26 (vi)	15	13	(vi) Extension of summary jurisdiction under Section 128, Act V of 1908.
			Suggestions on the work of the High Courts on their Appellate Side.
27 (i)	16	2	(i) Precautions against an applicant selecting the Bench or Judge before whom he prefers to make an application.
27 (ii)	16	3	(ii) The recognition of a definite time after which applications in revision will not ordinarily be entertained.
27 (iii)	16	4	(iii) Discrimination in calling for records, especially in revision and in interlocutory matters.
27 (iv)	16	5	(iv) Reduction of "reserved" judgments to a minimum.
27 (v)	16	7	(v) Improvement in the preparation of cause lists.
27 (vi)	16	15-17	(vi) Some alterations in some High Courts as to paper books.
28	17	21	Alteration of the procedure by rules under section 9, Presidency Small Cause Courts Act, XV of 1882, so as to enable proper cause lists to be arranged of contested cases only, and for other purposes.
29	17	23	Alteration of rule 101 in respect of the Calcutta Small Cause Court, so as to raise the value of suits which can be tried under the summary procedure to Rs. 200.
30	17	24	Attention to the question of interpretation of evidence in the Presidency Small Cause Courts.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
31	17	25	Amendment of the rules and practice in respect of instalment orders in the Calcutta Small Cause Court.
32	20	11	Extended use of the rule making power under section 9, Suits Valuation Act, VII of 1887 with the sanction of the Local Government.
33	28	6-7	Alteration of the system in the Madras High Court by which the deputy registrar deals with applications in revision under section 25 of Act IX of 1887.
			Execution.
34 (i)	29	11	(i) Better supervision over the issue of copies of decrees, with returns showing delay.
34 (ii)	29	12	(ii) Every execution petition presented on a particular day to be brought up for orders the next day.
34 (iii)	29	12	(iii) Correction where necessary by court itself of the amount stated in the application to be due.
34 (iv)	29	17	(iv) Increased facilities for payment of decretal amounts to the court or the decree-holder by money-order.
34 (v)	29	18	(v) Provision for payment of the decretal amount when received by the court by money-order from the court to the decree-holder.
34 (vi)	29	20	(vi) Instructions (if Local Governments agree) for co-operation in certain instances between the police and the process-serving staff in execution of warrants of arrest.
34 (vii)	29	27	(vii) Instructions to courts directing them to fill in the estimated value of the property to be sold in the sale proclamation under Order XXI, rule 66, only by giving the estimates of the decree-holder and judgment-debtor or making a rough estimate.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
34 (viii)	30	26	(viii) Preparation of a form for sale certificates.
34 (ix)	31	1	(ix) Concentration in one court of all execution work in places where there are several courts.
34 (x)	31	4	(x) Addition of a rule empowering a decree holder, if he wishes, to pay the fees for various proceedings in execution at one time.
34 (xi)	31	5	(xi) Instructions as to a "court rate" of interest by each High Court.
34 (xii)	31	7	(xii) Provision for execution work in vacations.
34 (xiii)	32	3	(xiii) Additional columns in suit register.
34 (xiv)	32	4	(xiv) Monthly certificate of examination of 10 per cent. of execution applications disposed of in previous month to be furnished by presiding officers of subordinate courts to district judges.
34 (xv)	32	5	(xv) Modification of the register of execution applications in conformity with the Punjab form.
34 (xvi)	32	6	(xvi) Better returns in execution matters.
34 (xvii)	32	9-11	(xvii) Rules as to the preservation of certain papers in execution matters.
35	34	4	Improvements in the issue of rules and circular orders to subordinate courts.
36	34	6	Improvements in order sheets with special reference to the Punjab.
			Returns.
37	34	9	Necessity of strict adherence to the forms required by the Government of India and uniformity in preparation.
38	34	18	Preparation of annual returns, to furnish particulars of work done in the exercise of original civil jurisdiction by all High Courts which exercise such jurisdiction.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
39	34	18	Preparation of annual returns everywhere to give full information as to appellate work.
40	34 28	18 5	Preparation of full returns to give information as to revisional work under section 115, C. P. C. and section 25 of the Provincial Small Cause Courts Acts, separately.
41	34	19	Preparation of annual returns showing figures of execution proceedings.
42	34	20	Preparation of annual returns showing figures of insolvency proceedings.
43	34	21	Preparation of annual returns showing figures of interlocutory injunctions.
44	34	22	Preparation of annual returns showing figures of stay of execution.
45	34	23	Preparation of annual returns showing figures of work done by each subordinate civil court.
46	34	24	Preparation of annual returns giving the number of suits undecided at close of year, classified according to the years of institution.
47	34	26	Submission of abstracts of order sheets in all suits pending over a year periodically to district judges and then to the High Courts.
48	34	27	Record of the time when judicial officers take their seats on the Bench for disposal of business in open court.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
49	34	29	Improvements in inspection of subordinate courts.
50	34	30	Appointment of Inspectors of judicial offices.
51	34	31	Appointment of peripatetic district judges to relieve district judges of other duties, in order to give them an opportunity to do their inspections.
52	34	33	Inspections by High Court Judges whenever possible.
53	34	34	Increased facilities for the performance of administrative work by High Courts.
54	34 16	35 6	Increase of the powers of the Registrars in High Courts and increased delegation of duties to them.
55	34	38	Increased activity by Rule Committees.
56	38	9	Strengthening of the office of the Testamentary Registrar in the High Court, Bombay.
57	44	2 and 4	Fuller provision for the recovery of necessary costs as between party and party.
58	45	2	Issue of instructions to subordinate courts in respect of the issue of "*ex parte*" injunctions.
59	50	8-9	Reconsideration of standards in Madras Civil Courts.

IV.

Recommendations which require the sanction of the Government of India.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
			Modifications in statements in the Statistical Abstract of British India.
1 (i)	34	7	(i) Issue of instructions to obtain uniformity.
1 (ii)	34	13	(ii) Additions to Form No. 29.
1 (iii)	34	14	(iii) Additions to Form No. 30.
1 (iv)	34	15	(iv) Additions to Form No. 31.
1 (v)	34	16	(v) Additions to Form No. 32.

V.

Recommendations which require administrative action by Local Governments.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
1	7 Sec. I.	8	More extensive use of the provisions of section 92, Act V of 1908, so as to empower subordinate judges and munsifs to hear and determine suits under that section.
2	7	10	More extensive use of powers of delegation under the Succession Certificate Act (VII of 1898).
3	7	12	More extensive devolution of powers under the Provincial Insolvency Act (V of 1920) to subordinate courts.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
4	7	13	More extensive use of the provisions of section 3, Land Acquisition Act (1 of 1894) to appoint subordinate judges to hear and determine references under that Act.
5	7 Sec. II.	5	Use of the provisions of section 15 (1), Provincial Small Cause Courts Act (IX of 1887) to increase the jurisdiction of officers invested with powers under that Act.
6	7 Sec. II.	6	Re-arrangement of territorial jurisdiction of Provincial Small Cause Courts.
7	7 Sec. V.	24	Encouragement of village courts towards relief of stipendiary courts.
8	10 48 49	8-12, 21 19 11	Abolition of the system (where it exists) under which the person wishing to have a process-served must supply an identifier to accompany the process-server and substitution of a system by which identification is arranged by the authorities, the party being only called to assist as a last resort.
9	11	22-24, 28-29	Improved training of officers in the Indian Civil Service before appointment as District and Sessions Judges.
10	12	15	Training of Judicial officers to enable them to take charge of Commercial courts.
11	14	24-25	Necessity of a better system of official receivers under the Provincial Insolvency Act. Necessity of supervising them.
12	15 Bombay.	9	Improved office arrangements in the Bombay High Court.
13	15	20	That evidence on the Original Side, Bombay High Court, be taken in shorthand and shorthand-writers be supplied.
14	15 Karachi.	9	Remodelling the Small Cause Court at Karachi (which should be made a Presidency Town Small Cause Court) on the lines of that at Rangoon.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
15	20	11	Rules under section 9, Suits Valuation Act (VII of 1887).
			Execution.
16 (i)	29	20	(i) Assistance in certain circumstances of process-servers by the police in execution of arrest warrants.
16 (ii)	30	6	(ii) Preparation of returns of execution by Collectors to be submitted through district judges to the High Court.
16 (iii)	30	6	(iii) General reconsideration of the policy as to delegation of execution of decrees to Collectors.
17	34	10	Accurate preparation of the figures showing the annual receipts and expenditure of civil courts.
18	38	8	Encouragement of the deposit and registration of Hindu wills.

VI.

Recommendations for consideration by presiding officers of Courts.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
1	1	24	Improvement in method in handling uncontested cases.
2	3	2-6	Improvement in fixing of dates for hearing.
3	3	7-9	Increased expedition in filing written statements.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
4	3	12	Stricter insistence upon proper pleadings.
5	3	13, 22	Seeing that proper discovery is made and admissions asked for before trial.
6	3	24	Improvement in framing issues, after such examination of parties and pleaders as may be required in the circumstances of a particular case.
7	4	1	Enforcement of the rule as to "opening" a case.
8	4	2	Improvement in controlling the examination-in-chief, cross-examination and re-examination of witnesses under the existing law.
	4	11	Enforcement of the rule that the hearing of a suit once begun should proceed from day to day.
10	4	12	Insistence on the prompt hearing of arguments as soon as the evidence is closed, and the hearing of arguments from day to day.
11	4 10	13 6, 28	Enforcement of the rules as to granting adjournments. Insisting on the payment of costs as a condition of obtaining an adjournment, when the granting of the adjournment prejudices the other side. Failure to produce a witness to be no reason for adjournment.
12	13	6	Requirement of security for amount awarded before staying execution of an award under the Indian Arbitration Act (IX of 1899).
13	4	14	Improvement in presentation of a concise statement of the case in the judgment.
14	5	4	Giving priority to cases for the decision of which other cases are held up.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
15	5	5	The necessity of scrutinizing carefully applications in interlocutory matters, the admission of which will hold up the decision of the original proceedings and giving priority to such applications.
			Provincial Insolvency Act (V of 1920).
16 (i)	14	17	(i) The necessity of enforcing strictly the provisions of section 41, and obliging insolvents to apply for discharge within the time specified and the utilisation of the provisions of section 43.
16 (ii)	14	18	(ii) The necessity of enforcing strictly the provisions of section 22 and the utilisation when necessary of the provisions of section 69 against a debtor who has wilfully failed to perform the duties imposed on him thereunder.
16 (iii)	14	20	(iii) The necessity of correct practice under section 29.
16 (iv)	14	24-25	(iv) The necessity of greater care in appointing and supervising receivers.
			Presidency Towns Insolvency Act (III of 1909).
17	14	34	Necessity of compliance with the provisions of sections 24 and 25 so as to ensure the expeditious production of the schedule.
			Execution.
18 (i)	29	19	(i) A more careful application of the rule giving the court discretion to refuse to send a judgment debtor to the civil jail owing to his poverty.
18 (ii)	29	20	(ii) Closer supervision over the conduct of process-servers in executing warrants of arrest.

Serial No.	Reference.		Recommendations.
	Chapter.	Paragraph.	
18 (iii)	29	26	(iii) Exercise of great caution in granting injunctions staying execution or delivery when a suit has been filed in accordance with Order XXI, rule 63, with special reference to the Punjab practice.
18 (iv)	29	32	(iv) Appointment of a receiver of property sold in certain exceptional circumstances.
18 (v)	30	7	(v) Appointment of receivers in execution.
18 (vi)	30	17	(vi) Necessity of greater care in issuing notices under Order XXI, rule 37.
18 (vii)	31	6	(vii) Necessity of greater care in staying execution under Order XLI, rule 5.
19	45	9	Exercise of discrimination in issuing *ex parte* injunctions.

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